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REPORTS

OF

CASES

DETERMINED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench and Common Pleas,

AND ON

THE CIRCUITS,

FROM THE

Sittings after HILARY TERM, 49 GEO. III. 1809,

TO THE

Sittings before EASTER TERM, 51 GEO. III. 1811,

BOTH INCLUSIVE.

BY JOHN CAMPBELL, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

Si de interpretatione legis quæratur; in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus usa fuisset. PAND. L. I. t. 3.

VOL. II.

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1811.

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K. B.

K. B.

GENERAL RULES.

HILARY TERM, 44 GEORGE III. 1804.

Rule for ſpecial jury in Middleſex and London, muſt be ſerved day preceding adjournment day, and cauſe then marked as ſpecial jury in marſhal's book.

IT is ordered by the Right Honourable Lord ELLENBOROUGH, C. J. &c. that in future no cauſe be tried by a ſpecial jury in *Middleſex* or *London*, unleſs the rule for ſuch ſpecial jury be ſerved, and the cauſe marked in the Marſhal's book as a ſpecial jury, on or before the day preceding the adjournment day in *Middleſex* and *London* reſpectively.

EASTER TERM, 51 GEO. III. 1811.

Notice of trial may be given in K. B. for the adjournment day in London, and it is ſuffi. to give ſuch notice 8 days in couhtry cauſes and 4 days in town cauſes, before the firſt ſittings after term.

IT is ordered, that in every notice of trial hereafter to be given for the ſittings after any term to be holden at the *Guildhall* of the *City of London*, it ſhall be ſpecified whether the cauſe is intended to be tried at the firſt day of ſuch ſittings, or at the adjournment day; and that in every caſe in which ſuch notice ſhall ſpecify that the cauſe is to be tried at the adjournment day, it ſhall be ſufficient to give ſuch notice eight days before the firſt day of the ſittings after term, if the defendant or defendants reſide above forty miles from the ſaid city of London, and four days before the ſaid firſt day, if the defendant or defendants reſide within that diſtance.

BY THE COURT.

The ſame courſe is directed to be purſued in C. P. by R. H. 32 Geo. 3. By this arrangement, the plaintiff has ſix days more in country cauſes, and four days more in town cauſes, to give notice of trial for the London ſittings, than he had by the former practice of the court.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,
49 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER. 1809.

Tuesday, Feb. 14.

BEALE q. t. *v.* GEALE.

A master workman employs in a trade within 5 Eliz. c. 4. a person who had never before worked in it, under a parol agreement to teach him the business, in consideration of a premium, and to pay him weekly wages. This is not an apprenticeship within the meaning of the statute; and the master is thereby subject to a penalty for setting to work in his trade one who had not served therein seven years as an apprentice.

DEBT on 5 Eliz. c. 4. § 31. The declaration stated that defendant, while he used and exercised the art, mystery, or occupation of a sawyer, to wit, on, &c. *did set one Joseph Dean on certain work in the said art, mystery, or occupation,* and did continue the said J. D. so set on such work, &c. although the said J. D. at the time he was so set on work in the said art, mystery, or occupation as aforesaid, and employed as aforesaid, *had not been brought up,* or *served therein seven years as an apprentice.*

The only witness called was *Joseph Dean,* who stated, that he worked with the defendant as a sawyer during the time mentioned in the declara-

1809.
BEALE v. GEALE.

tion; that till then he was quite unacquainted with this business; that he went into the defendant's service for the purpose of learning it; that he had agreed to give the defendant a premium for teaching him; but that in the mean time he was himself to receive from the defendant a pound a week for his labour.

Marryat for the defendant contended, that *Dean* was to be considered as *an apprentice* while working under this agreement. There was nothing in the statute to prohibit the taking of apprentices, or to prevent the master from setting them to work in his trade. But this was clearly a contract of apprenticeship, although not by indenture, nor for the term of seven years. The validity of the contract was immaterial, if it provided that the one party should *teach* and the other *learn* some trade or business. An apprenticeship, though not for seven years, conferred a settlement under the poor laws; and a contract of this nature should more particularly be recognized as an apprenticeship, where a penalty was sought to be recovered for doing what was beneficial both to the individual and the community.

Lord ELLENBOROUGH. If *Dean* could be considered an apprentice, certainly this action cannot be supported. He may have been an apprentice to some purposes; but within the meaning of this act, I think he was a workman of that class whom it is declared unlawful to employ. There is no instrument to constitute the relation of master and apprentice between him and the defendant; there is

no

no evidence of any term being fixed upon during which he was to continue in the defendant's service; and he was to be paid weekly wages from the moment of his being set to work at the business. The defendant therefore is liable to a penalty, whatever may be the policy of the statute by which it is imposed.

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Verdict for the plaintiff.

Garrow and *Espinasse* for the plaintiff.

Marryat for the defendant.

[Attornies, *Brown* and *Empson*.]

Vide Coward v. Maberley, *post*.

JEFFERIES v. DUNCOMBE.

Tuesday, Feb. 14.

THIS was an action on the case for suspending a lamp before plaintiff's house in the day-time, to denote that he kept a brothel.

In an action for suspending a lamp before plaintiff's house, to denote that he kept a brothel, the parish in which the declaration states the house to have stood and the tort to have been committed, is to be considered as venue merely, not as local description; and it is immaterial whether there be any such parish in existence.

The declaration stated, that at the time of the grievance complained of, the plaintiff was occupier of a certain dwelling-house with the appurtenances, *situate, lying, and being in a certain public street called Artillery Street, to wit, in the parish of the Old*

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Artillery Ground in the county of Middlesex, in which he carried on the business of a carpenter, and a great part of which he let out to lodgers; yet that the defendant, intending to cause it to be believed that he kept a disorderly house, and to subject him to the punishment provided for that offence, unlawfully, wantonly, and maliciously, without any reasonable or probable cause, to wit, on the 25th day of August, 1808, *in the parish aforesaid in the county aforesaid*, put up, raised, and erected in the said public street called Artillery Street, *to wit, in the parish aforesaid in the county aforesaid*, a certain lamp in the front of and near adjoining to the said dwelling-house of plaintiff, and caused the same to be lighted and kept lighted and burning during the day-time for a long space of time, &c. thereby designating the said dwelling-house of plaintiff as a bawdy house, &c. by means whereof his lodgers left him, and he was injured in his business.

Garrow for the defendant insisted, that the plaintiff must be nonsuited, as there was no such parish as "*the parish of the Old Artillery Ground.*"

Park, contra, maintained, that wherever the parish was mentioned, it was by way of venue, not of local description, and that it was the same as if it had been laid in the parish of St. Mary le Bow in the ward of Cheap.

Lord ELLENBOROUGH was of the latter opinion, but saved the point; and the plaintiff had a verdict with 1*s.* damages.

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Next term a rule nisi was granted to set aside the verdict: but cause being shewn, the Court unanimously held, that the parish mentioned in the declaration must be referred to *venue* in the same manner as if this had been an action for a libel; and GROSE, J. said, it might be considered an action for libelling the plaintiff by means of suspending a lamp before his door.—*Rule discharged.*

Park and *Espinasse* for the plaintiff.

Garrow and *Bolland* for the defendant.

[Attornies, *Isaacs* and *Parnell.*]

In trespass *quare clausum fregit*, where the locus in quo is stated to be *in the parish of A.* it is enough if *A.* has a church and overseers of its own, and is reputed a parish, although perhaps strictly speaking it may be only a hamlet. In such an action the Court will not try a question of *parochiality*. Per Lord ELLENBOROUGH, C. J. *Anon. Hertford Sum. Ass.* 1809.

Vide Mersey and Irwell Navigation Co. *v* Douglas, 2 East. 437.

KING, Esq. *v.* MILSOM.

Wednesday, Feb. 15.

TROVER for a 50 *l.* Bank of England note.

Possession is primâ facie evidence of property in negotiable instruments. Therefore, in trover for a bank note, it is not a primâ facie case for the plaintiff, to prove, that the note belonged to him, and that the defendant afterwards converted it: and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it malâ fide or without consideration.

The plaintiff's case was, that he had lost the note from his pocket in the streets; and that the

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defendant, into whose possession it soon after came, was not the *bonâ fide* holder of it for a valuable consideration.

The facts proved were, that on the 18th of July 1808, the note was in the possession of the plaintiff as his property; that on the 21st of the same month payment of it was stopped at the Bank of England by his orders; that the following day an advertisement was inserted in a newspaper taken in by the defendant, stating the loss of the note, and mentioning where it should be carried by the finder; that it was brought into the Bank on the 29th of August, and immediately traced to the defendant, who keeps a public-house; that he at first said he did not recollect how he came by it, and afterwards affirmed he had given change for it about a month ago to a stranger, in payment of a glass of brandy and water; but that he can neither write nor read, and that he was accustomed to receive notes of equal amount in the course of his business.

Garrow for the plaintiff insisted, that this evidence rendered it incumbent upon the defendant to shew his title to the note. To support an action of trover, it was *primâ facie* enough to prove that the article in question had been the property of the plaintiff, and had been converted by the defendant. To be sure, the defendant might still shew that he had received it as a present from the plaintiff, that he had bought it in market overt from a stranger, that he had a lien upon it, or that in any other way the plaintiff had not the right of action which he

at

at first appeared to have. But unless some answer were given to the case of property in the plaintiff and conversion by the defendant, the plaintiff must always recover. Bills of exchange and promissory notes must be governed by the same rule with other property. Merchants and tradesmen could have as little difficulty in shewing from whom and upon what consideration they received a 50*l.* bank-note, as if the matter in question were a horse or a piece of furniture of that value. The defendant was therefore bound to prove his title to this note, or the court and jury must presume that he got possession of it *malâ fide*, and that in his hands it still remained the property of the plaintiff.

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Lord ELLENBOROUGH. There is a distinction between negotiable instruments and common chattels. With respect to the former, possession is *primâ facie* evidence of property. I must presume, that the defendant, when possessed of this note, was a *bonâ fide* holder for a valuable consideration. It lies upon you to impeach his title. You might have thrown so much suspicion upon his conduct in the transaction, as to have rendered it necessary for him to prove from whom he received the note, and what consideration he gave for it. But I think you have not done so. The suspicious circumstances detailed by the witnesses may be accounted for from the defendant's ignorance. It would greatly impair the credit and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be com-

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pelled by any prior holder to disclose the manner in which they received them.

Plaintiff nonsuited.

Garrow and *Gifford* for the plaintiff.

Park and *Espinasse* for the defendant.

[Attornies, *Turner* and *Glynes*.]

A bank note, though stolen, becomes the property of him who gives valuable consideration for it, having no notice nor knowledge of the robbery. Miller v. Race, 1 Burr. 452. So, although the loser of a bill advertizes it in the newspapers, the person who afterwards *bonâ fide* discounts it for the fraudulent finder, may recover upon it against the acceptor. Lawson v. Weston, 4 Esp. 56.—As to the peculiar nature of the property in negotiable securities, see the very profound and comprehensive argument of EYRE, C. J. in Collins v. Martin, 1 Bos. & Pul. 648.

ADJOURNED SITTINGS AT WESTMINSTER. 1809.

GAINSFORD v. GRAMMAR.

Thursday, Feb. 16.

GOODS sold and delivered. Pleas, the general issue, and the statute of limitations.

The goods had been delivered seven or eight years ago. To take the case out of the statute,

Mr. *Walls*, the defendant's attorney, was called, who stated, that about a year and a half ago, he carried certain propositions from the defendant to the plaintiff; there was not then, nor for several months after, any suit depending between the parties; but he then considered himself as acting in the capacity of attorney for the defendant, and he had since charged for his attendances as such.—*Q.* "What was the nature of the propositions you made to the plaintiff, by order of the defendant?"

Park objected, that whatever the witness might have been instructed by the defendant to propose to the plaintiff on this occasion was a privileged communication between attorney and client.

Garrow, contra, cited *Cobden* v. *Kendrick*, 4 T. R. 431. and *Wilson* v. *Rastall*, *Ib.* 753. to shew, that unless

A. having a demand upon B., B. before A. commences any action, employs C. his attorney, to make certain propositions to A. upon the matters in difference between them. C. cannot be examined as to what B. said upon the occasion, for this is to be considered a privileged communication between attorney and client. But what C. said when he made the propositions to A. is good evidence against B. without further proof of C. being authorized by him than the fact of C. being his attorney.

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unless the witness was really acting as attorney to the party at the time, he was bound to disclose what passed between them; and contended, that Mr. *Walls* was not employed on this occasion in his professional capacity, but was merely in the situation of a steward, or any other confidential agent, whose testimony was not privileged.

Lord ELLENBOROUGH. I fully accede to the doctrine laid down in *Cobden* v. *Kendrick*, and *Wilson* v. *Rastall*, which is no more than this, that communications by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, are not privileged. But this relation may be formed before the commencement of any suit. The attorney may be retained, and confided in as such, in contemplation of a suit; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out or the service of the writ? It is clear that in this case *Walls* was employed as an attorney when he was directed to carry these proposals to the plaintiff.

Garrow then proposed to call another person who was present at the conversation between the plaintiff and *Walls*, to state what the latter then said.

Park insisted, that it was first necessary to prove that *Walls* had authority for this from the defendant.

Lord ELLENBOROUGH. It has been proved that he was then the defendant's attorney, and the law will

will therefore infer that he had authority for what he said or did upon this occasion. 1809.

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It appeared that *Walls* had made an offer from the defendant of 2s. 6d. in the pound, and this being considered a sufficient acknowledgment to take the case out of the statute, the plaintiff had a verdict for the amount of his demand.

Garrow and *Marryat* for the plaintiff.

Park for the defendant.

[Attornies, *Lemage* and *Walls*.]

Vide Robson *v.* Kemp, 5 Esp. 52. Brard *v.* Ackerman, ib. 119. Spenceley *v.* Schulenburgh, 7 East. 357.

BALLS *v.* WESTWOOD.

Thursday, Feb. 16.

USE and occupation.

In an action for use and occupation, where the defendant has come in under the plaintiff, he cannot shew that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person.

It was proved that the defendant entered upon the premises in question (a copyhold tenement of the manor of Edmonton) under the plaintiff, to whom he had paid rent till within the last two years, and that he still continues in possession.

J. Warren

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WESTWOOD.

J. *Warren* stated as a defence to the action, that about two years ago this copyhold tenement had been regularly seized as forfeited into the hands of the lord of the manor, by process from the court-baron, and that the defendant having notice from the steward to pay the rent to the lord, had punctually done so ever since.

Lord ELLENBOROUGH. Did you by any formal act renounce the plaintiff's title? Did you divest yourself of the possession you obtained under the plaintiff, and commence a fresh holding under another person?

J. *Warren* answered, that such a form had been thought unnecessary; and contended, that as the defendant did not dispute the plaintiff's original title to the premises, he was at liberty to shew that that title no longer existed.

Lord ELLENBOROUGH. You may as well attempt to move a mountain. You cannot controvert the continuance of the title of the person under whose demise you continue to hold. The security of landlords would be infinitely endangered if such a proceeding were permitted. Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now enquire into the validity of the seizure, and consider who is legally entitled to the premises; but the same tenancy continues which was created by the

the original demise, and the tenant must still pay rent to the lessor whose title he then recognized.

Verdict for the plaintiff.

Park and *Gaselee* for the plaintiff.

J. *Warren* for the defendant.

[Attornies, *Duncombe* and *Wadeson*.]

But in *ejectment* by landlord against tenant, the tenant may shew that the landlord's title has expired; although he cannot be permitted to prove that the landlord never had any title. England ex d. Syburn v. Slade, 4 T. R. 682.

In an action for use and occupation, where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. *Cobb v. Carpenter. Same Day.* The defendant entered upon a leasehold cottage, under J. S. who soon after mortgaged it to W. S., and in 1806, assigned the equity of redemption to the plaintiff. On the 18th of July last W. S. assigned the legal estate in the premises to the plaintiff. The defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended that although a person having the equitable estate only, perhaps could not maintain use and occupation without privity of contract, yet the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him, so as to entitle him to two years rent. But Lord ELLENBOROUGH clearly held, that he could only recover rent for the period between the 18th of July and Michaelmas day 1808.—His lordship likewise

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likewise ruled in the same cause, that the defendant, who just before he quitted had been distrained upon by the ground landlord for several years' ground rent, amounting to a much larger sum than was due to the plaintiff, could only set off a part of this sum proportioned to the period during which the plaintiff had the legal estate; and that the fact of the plaintiff having brought an ejectment for the same premises, laying a demise on the 18th July 1808, was no bar to the present action, but was only matter of special application to the court.

ADJOURNED SITTINGS IN LONDON.

Saturday, Feb. 25.

HOWELL Widow *v.* LOCK.

In a regular examination upon the *voire dire*, before the examination in chief, a witness may be interrogated as to the contents of written instruments not produced; but this cannot be done after the examination in chief, although the only object of the questions then put be to shew, that the witness is interested.

ACTION on a builder's bill.

A surveyor called on the part of the plaintiff stated, in cross examination, that he was her son in law, and that she carried on the business for the benefit of her late husband's estate. He was then asked, what interest he and his wife took under the will of the deceased?

Park for the plaintiff objected that the will itself should be produced.

Garrow, contra, insisted that he had a right to put the question, as this was to be considered an examination upon the *voire dire.*

Lord

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HOWELL v. LOCK.

Lord ELLENBOROUGH. The contents of written instruments may certainly be inquired into in an examination upon the *voire dire*; but if there is to be such an examination, it must take place in its due order—before the examination in chief. If at any time it appears incidentally that the witness is interested, I will strike out his evidence; but in cross-examination I cannot allow you the privileges of an examination upon the *voire dire*. The question is irregular.

The cause was afterwards referred.

Park and *Comyn* for the plaintiff.

Garrow for the defendant.

[*Attornies, Vandercom* and *Stratton.*]

Vide the Queen v. Muscot, 10 Mod. 193. Turner v. Pearte, 1 T. R. 719. Botham v. Swinglers, Peak. Cas. 218. 1 Esp. Cas. 164. S. C.

ADDERLEY v. COOKSON.

Saturday, Feb. 25.

ASSUMPSIT for carrying the defendant as a passenger in the *Devaynes* East Indiaman from Madras to England.

There is no implied promise on the part of an officer in the East India Company's service to pay the captain of a Company's ship by which he returns to England, more than the regulation sum for his passage, although it may have been usual to pay more.

The

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The defendant was a lieutenant in the Company's service, and came home on *a sick certificate*. By an order of the court of Directors, officers of this rank coming home under these circumstances are to pay 1000 rupees and no more "for their passage and accommodation at the captain's table."

The defendant paid the amount of this sum in English money into court; but the plaintiff went for £145 more.

His case was, that for the regulation price, officers are only entitled to swing their cots in the *steerage;* that lieutenant Cookson had a cabin to himself; and that the sum demanded was not more than he received from others who enjoyed the same advantage; but it appeared that, on board the *Devaynes* during this voyage, no officers did sleep in the steerage; that the cabin occupied by the defendant would have remained empty, or been filled with stores if he had been excluded from it; and that he had not made any express promise to pay more than the 1000 rupees.

Lord ELLENBOROUGH. The order says nothing about sleeping in the *steerage*. Why then should the officers be confined to that part of the ship? Had any other person who would have hired this cabin been excluded from it by the defendant, and the plaintiff's profits had been thereby diminished, the case might have been different. But I see nothing

nothing to raise an implied promise on the part of this defendant to pay beyond the regulated sum.

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ADDERLEY v. COOKSON.

Plaintiff nonsuited.

Park and *Richardson* for the plaintiff.

Garrow for the defendant.

[Attornies, *Eaton* and *Wilshen*.]

FORSTER and others, *v.* CLEMENTS.

Saturday, Feb. 25.

ASSUMPSIT for money paid. Plea, the general issue.

In an action by bankers to recover the amount of a bill of exchange accepted by the defendant payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee, as well as the acceptance by the defendant.

This action was brought by *Messrs. Forster, Lubbocks and Co.* bankers in London, to recover the sum of 100 *l.* paid by them to the holder of a bill of exchange, accepted by the defendant *payable at their banking house*. The bill was drawn by one Hanley, payable to his own order, and when paid by the plaintiffs had his indorsement upon it.

Paley, (of counsel for the plaintiffs,) at first satisfied himself with proving the defendant's handwriting to the bill; that it was paid by the plaintiffs; and that the defendant had then no effects in their hands.

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FORSTER v. CLEMENTS.

Lord ELLENBOROUGH said he must go farther, and give evidence of the indorsement by Hanley, to whose order the bill was payable.

Paley contended that *primâ facie* the hand writing must be taken to be Hanley's, and that as it was the custom of bankers to pay a bill with the name of the payee written upon the back of it, a request from the acceptor must be understood for them to do so. When this bill was presented to the plaintiffs for payment, it appeared in a negotiable shape, and they were authorized to pay it without inquiring into the title of the holder.

Lord ELLENBOROUGH. If the acceptor of a bill of exchange makes it payable at a banker's, he requests the latter to pay it only to the payee or his order, and not to any person who presents it. If the banker pays it without ascertaining the indorsement to be genuine, it is at his own risk. The name of Hanley upon this bill may be forged; in which case, the plaintiffs have paid it in their own wrong.

Evidence was afterwards given of an acknowledgment by the defendant, that Hanley had indorsed the bill; and the plaintiffs had a verdict for the 100*l.*, but without interest, to which Lord Ellenborough said they had shewn no right.

[Attornies, *Crowder* and *Co.* and *Follett.*]

Vide Cheap *v.* Harley, cited 3 T. R. 127. Mead v. Young 4 T. R. 28.

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ELIZABETH HUXHAM, Spr. *v.* SAMUEL SMITH. Monday, Feb. 17.

POLICY of insurance upon goods, by the ship *Two Friends*, from London to Charleston.

Plea, the general issue to all except £.20. 14. 6. and as to that a tender.

It was admitted that the defendant had subscribed the policy for £.100, and that a loss had happened of £.76. 14s. 6d. per cent.

As a discharge for £.56. the defendant put in the record of a cause in the Lord Mayor's court, wherein one *George Baker* was the plaintiff, *Eliza Huxham* was the defendant, and *Samuel Smith* the garnishee. From this it appeared, that upon a judgment of *quod habet*, *Smith* (the now defendant) had been ordered to pay £.56. of the monies of *Miss Huxham* in his hands to *Baker*, and that there was an acknowledgment of satisfaction regularly entered.

To prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, is conclusive evidence. The record is only prima facie evidence that the debt for which the action was brought in the Mayor's Court, arose within the limits of the city.

Park objected to the validity of the attachment, on a suggestion that when the proceedings were instituted in the mayor's court, the policy was, and had ever since remained in the possession of one *Price*, who had a lien upon it; that *Smith* as garnishee, being in collusion with *Baker*, had admitted the policy, which could not otherwise have

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HUXHAM v. SMITH.

been proved, and that he had paid *Baker* the £. 56 before final judgment, although at the trial a case had been reserved for the opinion of the Recorder.

Lord ELLENBOROUGH. Supposing these facts to be true, I have not legal organs to see them. If the money was attached in the defendant's hands, and he paid it pursuant to the judgment of a court of competent jurisdiction, I must suppose *omnia rite acta*. Sitting at Nisi Prius, can I unravel the proceedings before the Recorder of London, and grant a new trial in the cause which he has decided? I must give credit to the record which is produced.

Park contended the defendant was bound to prove that *Baker* had a debt of £. 56 due to him from *Miss Huxham*, which arose within the city of London; and cited Palmer *v.* Hooke, 1 Ld. Raym. 727. as an authority in point.

The Common Serjeant (*Knowlys*) pointed out the hardship to which this would expose the garnishee. According to the mode of proceeding in the Mayor's court, upon the plaintiff's affidavit the debt was taken *pro confesso*, and *Miss Huxham* had an easy remedy if there was not a debt to this amount arising within the city, as by putting in bail at any time within a year and a day after final judgment, the attachment would be dissolved, *Baker* must return the money to the garnishee, and she might try the cause before the Recorder, or remove it into any of the courts at Westminster.

Lord

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Lord ELLENBOROUGH. I think the judgment is *primâ facie* evidence that the debt arose within the city; but this being a record of an inferior court, I will admit the defendant to prove the contrary.

A witness stated that Miss Huxham was a milliner at Charleston, and had ordered goods of Baker, a shopkeeper in Newgate Street, to be delivered on board a ship in the river *Thames;* that they were sent according to the order; but whether the ship which received them then lay within the bounds of the city, the witness could not tell.

If a merchant abroad orders goods of a shopkeeper residing within the city of London, to be put on board a ship lying beyond the limits of the city, and the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the Mayor's court as a debt arising within the city.

Lord ELLENBOROUGH. That is immaterial. There was a delivery as soon as the goods were put in a course of conveyance. The debt certainly arose within the city, and might be sued for in the Mayor's court.

An objection was then started that the Christian name of the plaintiff in this suit was *Elizabeth*, while that of the defendant in the suit below was *Eliza*; but upon evidence that the plaintiff's attorney had called her *Eliza*, Lord Ellenborough said it was enough that she appeared to be known as well by the one name as the other, and the foreign attachment was at last allowed to operate as payment of £. 56.

The witness to prove the tender said he offered to pay the £. 20. 14s. 6d. to the plaintiff's attorney, but required at the same time to have a receipt in full, or that the policy should be delivered up to be cancelled.

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HUXHAM v. SMITH.

This was held to be insufficient; and the plaintiff had a verdict for the last mentioned sum.

Park and *Richardson* for the plaintiff.

Knowlys, C. S. for the defendant.

[Attornies, *Sherwood* and *Rawkinson*.]

See the cases upon the law of *Foreign Attachment* brought together by Mr. Serjeant Williams, 1 Saund. 67 (1).

Tuesday, Feb. 28.

MOORE *v.* CLEMENTSON and others.

Although a factor sell goods as a principal, yet if before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person; in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor.

THIS was an action for goods sold and delivered.

The defendants allowed that they had purchased and received from one *Green*, since deceased, woollen cloths, which were the property of the plaintiff, a Yorkshire clothier, to the value of £. 600; but they contended that they had a right to set off against this a debt due to them from *Green*, who had died insolvent.

Green was a factor and warehouseman in Bush Lane, and sold the goods in question to the defendants in the months of February and March, 1807, without mentioning the name of any principal. Before they were all delivered, however, one of the defendants asked *Green*'s clerk "whose goods they were?" to which he answered, "*Moore*'s; he is the "manufacturer

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"manufacturer, and you may like to have them of "him when *Green* is dead." The bills of parcels were in *Green*'s own name. He was employed by a number of other clothiers in the country to dispose of their goods in town; and it was known to the defendants that he was in the habit of acting as a factor. *Green* died in May, 1807, indebted to the defendants beyond the value of the goods in question.

Garrow contended that the defendants under these circumstances had a clear right of set-off. They had dealt with Green as a principal, and the plaintiff having accredited him as such could not interpose to disturb the mutual rights subsisting between the parties. The conversation of the clerk only amounted to notice that *Moore* was the manufacturer; the goods might subsequently have become Green's own property; and at any rate, this notice came too late, as a considerable part of the goods had been previously delivered.

Park, contra, allowed that if the defendants were neither expressly told, nor had reason to believe, that in this transaction *Green* acted only as an agent, they were entitled to the set-off which they claimed; but he insisted that what the clerk said amounted to express notice of *Moore* being the owner of the goods, and that independently of this, the general knowledge which they possessed of *Green* being in the habit of acting as a factor was sufficient to put them upon their guard, and to prevent them from giving him credit as a principal.

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MOORE v. CLEMERSON.

Lord ELLENBOROUGH. If the defendants had merely had a general knowledge of *Green* being a factor, this I think would not be enough to deprive them of the privilege they derived from his actually selling those goods as a principal. A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal with the sanction of the real owner, the purchaser who is thus led to give him credit shall on no account afterwards be deprived of his set-off by the intervention of any third person. But here, there was express notice to the purchaser before the contract was completed, that Green in this particular transaction acted only as a factor. No stress could be laid upon the form of the bill of parcels; and the communication by the clerk was amply sufficient to inform the defendants of the true relation in which the parties stood to each other. The vendor therefore might interfere at any time before payment. The defendants might have paid *Green*, who seems to have had an uncountermanded authority to receive the price of the goods. They did not do so; and as this is not a case of mutual credit, the set-off cannot be allowed.

Verdict for the plaintiff.

Park and *Puller* for the plaintiff.

Garrow for the defendants.

[Attornies, *Barrow* and *Swain & Co.*]

Vide Waring v. Favenck, *ante*, Vol. I. 85. Coates v. Lewis, *ib.* 444.

CLEMENTI

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Tuesday, Feb. 28.

CLEMENTI and others *v.* GOLDING and others.

A musical composition published on a single sheet of paper is privileged as a book within 8 Ann, c. 19. § 1.

THIS was an action for pirating a musical composition called "*Heigh-ho!*" The declaration stated that the plaintiffs were proprietors of a certain book, being a musical composition, air and melody, known by the name of "*Heigh-ho!*" first printed and published within fourteen years now last past, the same being printed and published *in a single sheet of paper*; and that being such proprietors they printed and published for sale divers, to wit, 1000 copies of the said book, *each of such copies being printed on a single sheet of paper*, whereof they had sold 500 copies, and had the remaining 500 in their hands for sale; yet that the defendants wrongfully printed, published, and exposed to sale a great number, to wit, 1000 copies of the said book, *each of such last mentioned copies being printed on a single sheet of paper*, and sold divers of the said last mentioned copies; whereby the plaintiffs were prevented from selling the copies so remaining in their hands as aforesaid, and had been greatly injured in their copyright in the said book. In the 2d count the song was denominated *a writing* instead of *a book*.—Plea, the general issue.

The composition in question was a song in an Opera called "*Two Faces under a Hood*," the music of which was composed by Mr. Schield, and sold by him on the 12th December 1807, to the plaintiffs. They immediately published the whole in a body; and as "*Heigh-ho!*" proved a very popular air —

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air, they soon after brought out this by itself on a single sheet, in the manner stated in the declaration. Under a conception which generally prevailed among music sellers, that by so doing, the plaintiffs had lost their exclusive property in this air, the defendants likewise published an edition of it in the same form, which had a considerable sale. The defendants had reprinted the original words which were from the pen of *Mr. T. Dibdin*; but it was the piracy of the music only which the plaintiffs complained of as an injury.

Scarlett, for the plaintiffs, contended that this musical composition was clearly protected as *a book* by 8 An. c. 19. The legislature by the word *book* could not be considered as meaning only a number of printed sheets bound up together, since they talked in sec. 2. of a literary composition as a book before it was printed at all. Although in some dictionaries a book is defined to be a volume, or a literary composition of sufficient length to make a volume, according to its original meaning, it signifies any writing, without reference to size or form; and it is so used by the most celebrated authors. Thus, in Shakespeare's HENRY IV. *book* (*a*) stands for the *indenture* or instrument, by which *Mortimer*, *Glendower* and *Hotspur* agreed to divide England between them; and the commentators

(*a*) *Mort.* "By that time will our *book*, I think, be drawn." Hen. IV. Part I. Act III. Scene I. The instrument is a little before called *an indenture tripartite*. N. This is the same scene in which *moicty* is used for a *third* part.

upon

upon that passage point out various other instances in which the word is employed in the same sense. —In actions upon this statute compositions of a single sheet have frequently been considered as within its protection. In *Storace v. Longman* (*a*), before Lord Kenyon, which was an action for pirating an Italian air published upon one sheet, the objection now relied upon was not thought of, and the plaintiff recovered. So another action was brought soon after, with the same success, for pirating the popular melody, "*Hope told a flattering Tale*," which was printed in the same form. In *Hime v. Dale* (*b*), before Lord Ellenborough, the point

(*a*) *Storace v. Longman. Sittings after M. T.* 1788. The declaration stated that the plaintiff was composer of a musical air, tune and writing, and that it was reprinted by the defendant within the 14 years limited by the act, &c. *Erskine* for the defendant examined the plaintiff's sister, to shew that the song was composed to be sung by her at the Italian Opera, and that all compositions so performed were the property of the house, not of the composer. Lord KENYON said, that this defence could not be supported; that the statute vests the property in the author, and that no such private regulation could interfere with the public right.

(*b*) *Hime v. Dale. Sittings after M. T.* 1803.

This was an action for pirating the words of a song called "*Abraham Newland*," published on a single sheet of paper. Lord ELLENBOROUGH was inclined to think that such a publication was not protected by 8 An. c. 19. as the word *book* only means in common acceptation a plurality of sheets, but is decidedly used in this sense in one clause of the statute itself. He therefore nonsuited the plaintiff, but reserved the point for the opinion of the court.

Erskine for the plaintiff moved

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point was made, and his lordship nonsuited the plaintiff; but the court of K. B. afterwards set the nonsuit aside, and ordered a new trial.

Garrow

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next term for a rule to shew cause why the nonsuit should not be set aside. He contended that the legislature could never have meant to make the operation of the statute depend upon the type in which any composition is printed, or the form in which it is bound up. This song might easily have been extended over several sheets and rendered a duodecimo volume. In *Back v. Longman*, Cowp. 623, it was decided that music is within the act, and musical compositions most generally appear in this fugitive form. [Lord Ellenborough. In the case cited, the musical composition was a *sonata*, and a sonata may be a book.] It never occurred to the Lord Chancellor who directed the issue, or to Lord Mansfield, or any of the judges who decided the case, that the form of the publication could make any difference, and therefore it is not stated. If a different construction were put upon the act, many productions of the greatest genius, both in prose and verse, would be excluded from its benefits. But, might the papers of the *Spectator*, or *Gray's Elegy in a country Church-yard*, have been pirated as soon as they were published, because they were first given to the world on single sheets? The voluminous extent of a production cannot in an enlightened country be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations which will inclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines; and is all this profundity of mental abstraction on which the security and happiness of the species in every part of the globe depend to be excluded from the protection of British jurisprudence? But there is nothing in the word *book* to require that it shall consist of several sheets bound in leather, or stitched in a marble cover. *Book* is evidently the Saxon, **boc**, and the latter term is from the *beech-tree*, the rind of which

supplied

Garrow for the defendant said, that in *Hime v. Dale*, the Judges of K. B. had not given any express opinion

the place of paper to our German ancestors. The Latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. *Book* may therefore be applied to any writing: and it has often been so used in the English language. Sometimes the most humble and familiar illustration is the most fortunate. The *horn book*, so formidable to infant years, consists of one small page protected by an animal preparation, and in this state it has universally received the appellation of *a book*. So in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the paper *book* or the demurrer *book*. In the Court of Exchequer, a roll was antiently denominated a *book*, and so continues in some instances to this day. An oath as old as the time of Edward I. runs in this form: "And you shall deliver into the Court of Exchequer a book fairly written, &c." But the book delivered into court in fulfilment of this oath has always been a roll of parchment. —*Rule nisi granted.*

In Easter Term following *Garrow* was proceeding to shew cause against the rule, when Lord Ellenborough said, the question was of so much consequence, that the court were of opinion the matter should be reconsidered, and then, by a special verdict, it might be ascertained, whether the piece was a book within the meaning of the legislature.

Garrow, without arguing that point then, begged to draw their lordships attention to the libellous nature of the song, and contended it was of such a description that it could not receive the protection of the law in whatever shape it had appeared. It professed to be a panegyric upon money; but was in reality a gross and nefarious libel upon the solemn administration of British justice. The object of this composition was, not to satirize folly or to raise the smile of innocent mirth, but being sung in the streets of the capital, to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform.

The

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opinion, and had ordered a new trial that the facts might be more distinctly found, and a question of such importance might receive the most solemn determination. He therefore proposed that a case should now be made for the opinion of the court.

Lord ELLENBOROUGH. I do not at present see why a composition printed upon a single sheet should not be entitled to the privileges of the statute. We say "*Sit liber Index*," without referring to a volume either printed or written. I was at first startled at a single sheet of paper being called *a book*; but I was afterwards disposed to think, that it might be so considered within the meaning of this act of parliament; and when the matter came

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The mischievous tendency of the production would sufficiently appear from the following stanza; after hearing which the court would say whether the nonsuit ought to be disturbed.

The world is inclin'd
To think JUSTICE blind;
Yet what of all that?
She will blink like a bat
At the sight of friend *Abraham Newland!*
Oh! *Abraham Newland!* Magical *Abraham Newland!*
Tho' Justice 'tis known
Can see thro' a mill-stone,
She cant see thro' *Abraham Newland!*

Lord ELLENBOROUGH. If the composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction. But I think the present case is not to be considered one of that kind.

Lawrence, J. The argument used by *Mr. Garrow* on this fugitive piece as being a libel, would as forcibly apply to *The Beggar's Opera*, where the language and allusions are sufficiently derogatory to the administration of public justice.

The rule was made absolute; but the cause was not again carried down to trial.

before

before the court, the other judges inclined to the same opinion. Therefore, without putting the parties to the expence of a special case, which may be unnecessary, I will direct the jury to find for the plaintiff, and leave you to move the court, if on consideration, you think you can sustain your objection.

Verdict for the plaintiff.

In the ensuing term *Garrow* moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. He argued that in construing this and every other act of parliament, the language must be understood in its usual and popular acceptation: but any common person would stare if he heard a loose sheet of paper denominated a book. A book was defined by lexicographers, and was universally used to signify, a volume, written or printed, consisting of several sheets bound up together. It was expressly so used by the legislature in this very act of parliament, which provides, that if any person shall print, reprint, sell or import any book, without the consent of the proprietor first had and obtained, such offender or offenders shall forfeit such book or books, *and all and every sheet or sheets being part of such book or books*, to the proprietor or proprietors of the copy thereof." Thus the statute best explained itself, and *book* must be taken in the same sense throughout the whole. There might be a good reason why the legislature should leave ephemeral productions

appearing

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appearing upon a single sheet as they stood at common law. Authors of real merit very rarely gave their works to the world in this fugitive form; there was no absolute necessity for their ever doing so; and the trash which daily appeared on a loose sheet deserved no extraordinary protection or encouragement. But if the doctrine contended for on the other side were to prevail, the courts would soon have to try actions for pirating the substance of a hand-bill, or a piece of intelligence from a newspaper.

The JUDGES seemed unanimously of opinion that it could not depend upon the form of the publication, whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be *a book* within the meaning of the legislature; and that the verdict in the present action ought not to be disturbed.—*Garrow*, however, adverted to the magnitude of the property at stake, and stated it to be the earnest wish of the parties that a question of such importance to their trade should be more fully discussed. Upon this, the Court very reluctantly granted a rule to shew cause: but the defendants finding the opinion of the Judges so strongly against them, abandoned their rule, and it was afterwards discharged without argument.

Scarlett and *Richardson* for the plaintiff.

Garrow for the defendant.

[Attornies, *James* and *Wood*.]

DAGNALL *v.* WYLIE and another.

Wednesday, March 1.

If one acting as a broker, get bills discounted by another person at legal interest, the transaction is not usurious, however large a commission he may himself receive. Therefore where the acceptors of a bill of exchange tainted by usury applied to the drawer to discount other bills for them, to enable them to take it up, and he agreed to get them discounted by another person on receiving for himself 10 s. per cent. beyond the legal interest, and bills were accordingly accepted by them, which he got discounted pursuant to the terms of the agreement,—it was held that these bills were valid in the hands of a bonâ fide indorsee, although the person who got them discounted was liable to a penalty for taking excessive commission.

THIS was an action by the indorsee against the acceptors of a bill of exchange for 411*l.* 5*s.* 4*d.* dated 24th August 1807, drawn by one *G. Smith*, payable to his own order, at two months after date.

The defence was,—*usury* in the formation of the bill.

John Rimmer swore, that on the 9th of May 1807, the defendants being pressed for money applied to him for a loan, and he advanced them about 1600*l.* For the repayment of 800*l.* part of this sum, he drew upon them, and they accepted two bills for 400*l.* each, at two months; which were antedated, May 1: These he discounted for them with his own money, taking a commission of 10*s.* per cent. above legal interest. On the 1st of July, the defendants being unable to provide for the bills which were to fall due on the 4th, applied to the witness for assistance: he agreed to let them have 800*l.* on the former terms, and he drew upon them a bill, which they accepted, for 811*l.* 11*s.* 4*d.* at two months,—the odd money being for the interest, commission, and stamp. This he discounted for them, giving them a cheque upon his bankers for 800*l.* Towards the end of August, the defendants being still embarrassed, once more applied to the witness, to enable them to take up the bill

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for 811 *l.* 11 *s.* 4 *d.* which was to be due the 4th of September: he had no longer money himself; but he offered to get two other bills discounted for the same commission he received before: accordingly, the defendants, on the 24th of August, accepted two bills for this purpose, one for 411 *l.* 5 *s.* 4 *d.* (the bill in question), and another for 410 *l.* 6 *s.*, making together 821 *l.* 11 *s.* 4 *d.* Blanks were left in both for the name of the drawer, which were afterwards filled up with "*G. Smith.*" These bills the witness got discounted for lawful interest; but on account of a loss he met with in the failure of *Corson & Co.* he paid no part of the sum he received for them to the defendants, who never had any consideration for either of them. He swore, that the 10 *s.* per cent. which he was to have for getting these two bills discounted, was intended as commission for his trouble as a broker, and not as interest for the loan of the money.

Topping for the defendants contended, that the bill on which the action was brought was void even in the hands of an innocent indorsee, being substituted for other bills tainted with usury, and being itself drawn to be negotiated on terms evidently usurious.

Lord ELLENBOROUGH. The May and July bills were certainly vicious; but what has polluted the bill on which the plaintiff seeks to recover? It was not discounted by *Rimmer* with his own money; he acted in this last transaction only as a broker. If he took more than 5 *s.* per cent. he is liable to a penalty

penalty for taking excessive commission (*a*). There could be no usury, if the party who advanced the money received no more than legal interest at the rate of 5*l.* per cent. per annum.

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The plaintiff had a verdict.

In the ensuing term, *Topping* applied to set aside the verdict, on the ground that the agreement upon which the bill was drawn was usurious: but the Judges were unanimously of opinion, that as *Rimmer*, who received the excess above legal interest, was not to discount the bill with his own money, there was no usury in the transaction, and therefore refused a rule to shew cause.

Park and *Marryat* for the plaintiff.

Topping and *Littledale* for the defendant.

[Attornies, *Kearsey* and *Cooper & Lowe.*]

(*a*) By 12 Ann. c. 16. § 2. it is enacted, that if any scrivener or broker take above the rate of 5s. per cent. upon any loan he transacts, he shall for every such offence forfeit 20 l. and suffer imprisonment for half a year.

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Thursday, March 1.

BROWN and others *v.* HODGSON.

Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped *by order and on account* of the consignee. The consignor cannot maintain any action against the ship-owner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship.

THIS was an action against the defendant as owner of the ship *Mercurius*, on board of which the plaintiffs had shipped certain goods, to be carried from *London* to *Tonningen*. The goods were expressed in the bill of lading to be shipped "by order and on account of *Hesse & Co.* of Hamburgh."

Before the *Mercurius* arrived at Tonningen, that place was declared in a state of blockade, and she was ordered by an English frigate to return home. On her arrival in the Thames, the captain, for the purpose (as was alleged) of getting rid of the cargo, and setting the ship at liberty to proceed on another voyage, made an affidavit that he believed the cargo to be *Danish* property (*a*). In consequence of this, the goods in question were unloaded by an order from the Court of Admiralty, delivered into the custody of the Admiralty Marshal, and afterwards libelled as lawful prize to his Majesty. However, by a decree of that Court, they were at last restored to the plaintiffs. The declaration averred that the captain made the affidavit knowing it to be false, and stated as special damage the injury the goods had suffered, and the expence the plain-

(*a*) An embargo had previously been laid upon all ships in British ports belonging to Denmark, and hostilities soon after commenced with that power.

tiffs

tiffs had incurred by the consequent proceedings in the Admiralty Court.

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* *Park*, for the defendant, contended, that at all events this action could not be maintained by the present plaintiffs, who had no property in the goods. The bill of lading stated them to be shipped *by order and on account of Hesse and Co.* Therefore the property vested in these persons the moment the goods were put on board the *Mercurius*. If the defendant or his agent had acted improperly with respect to the goods, *Hesse and Co.* only had been injured, and they only could be heard in a court of justice to complain of the injury. The plaintiffs might recover the value of the goods from the consignees, whatever became of them after they were shipped; and if the defendant should afterwards be sued by *Hesse and Co.* for the same cause, a recovery against him in this action would be no bar. In *Dawes* v. *Peck*, 8 T. R. 330, it was held, that if the consignor of goods has delivered them to a particular carrier by order of the consignee, the consignor cannot maintain an action against the carrier for the loss of them; and *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582. decided, that a delivery of goods by the vendor on behalf of the vendee to a carrier *not named* by the vendee, is a delivery to the vendee, so as to render him liable for their value, whether they ever reach him or not.

The Attorney General, contrà, took a distinction between goods sent from one part of England to another, and goods sent from England to a foreign

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country. In the former case, a delivery to the carrier was a delivery to the consignee; but in the latter, the risk was still the consignor's till the goods reached their destination. A merchant abroad said, "if you will deliver me goods at such a port, I will take them at such a price." Thus the property remained in the consignor till actual delivery, and he was in the habit of insuring the voyage. If the goods arrive safe, they are to be paid for; aliter, if they do not. That the goods in question remained the property of the plaintiffs when the false affidavit was made, appeared clearly from this fact, that they were restored to them by the Court of Admiralty.

Lord ELLENBOROUGH. The goods are shipped *by order and on account of Hesse and Co.* I can recognize no property but that recognized by the bill of lading. This action cannot be maintained.

Plaintiff nonsuited.

The Attorney General and *Gaselee* for the plaintiff.

Park, *Marryat*, and *Selwyn* for the defendant.

[Attornies, *Gregson & Dixon* and *Atcheson & Morgan.*]

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Friday, March 3.

SANSOM and others *v.* JAMES BELL.

The recital in the condition of an indemnity bond, professing to state the agreement between the parties, does not confine the responsibility of the sureties to the limits therein specified.

THIS was a writ of inquiry of damages, under stat. 8 & 9 W. 3. c. 11. The plaintiffs declared in debt on bond, dated 17th March 1803, for 20,000*l.* The defendant pleaded a former recovery; and there was judgment for the plaintiffs on an issue of *nul tiel record*. They then set out the condition of the bond, which, after reciting that they had agreed to accept bills of exchange to be drawn upon them by one *W. Bell* to the amount of 10,000*l.*, for which the said *W. Bell* had agreed to remit to them good bills of exchange, or notes, to answer the payment of all such bills to be drawn as beforementioned as they should respectively become due; and that the defendant and one *Hugh Bell*, in order to secure the plaintiffs against such acceptances as they might be under for the said *W. Bell*, had agreed to join with him in that bond of indemnity; —— was declared to be, that if the said *W. Bell* should well and truly pay or cause to be paid unto plaintiffs all such sum and sums of money as he should or might thereafter owe or stand indebted to them by reason or on account of their being so under acceptances for him the said *W. Bell*, or on any other account thereafter to subsist between them the said *W. Bell* and the plaintiffs, when and as the same should become due and payable, or in default thereof, in case defendant and the said *Hugh Bell*, or either of them, should and did, within one month next after demand thereof, well

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and truly pay or cause to be paid such sum and sums of money to the plaintiffs, not exceeding in the whole the sum of 10,000 *l.* and also well and sufficiently indemnify plaintiffs on account of their being so under acceptances for the said W. Bell in manner aforesaid, or on any other account to be thereafter subsisting between the said W. Bell and the plaintiffs, then the said writing obligatory to be void, &c. Several breaches were suggested in the usual form.

The only question between the parties was, whether the indemnity was confined to one set of acceptances to the amount of 10,000 *l.* or extended to a balance of that sum upon a running account.

Gaselee for the defendant contended, that the indemnity could not be carried beyond the first 10,000 *l.* The recital expressly limited the amount of the acceptances to 10,000 *l.*; and it was there that the real agreement of the parties was to be looked for. The words were enlarged by the condition itself to any account thereafter to subsist; but that must be referred to the foregoing agreement. It had been decided, that as against a surety, the condition of a bond could not be carried beyond the limits marked out in the recital. Thus, in *The Liverpool Waterworks Company* v. *Atkinson*, 6 East. 507, where the condition of the bond recited, that *A.* had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulated, that "at all times thereafter *during the continuance of such his employment, and for so long time as he should continue to be employed,*

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employed, he should justly account, &c." The obligation was held to be confined to the twelve months mentioned in the recital. So in *The Warden of St. Saviour Southwark* v. *Bostock*, 2 N. R. 175, where sureties were bound for the collector of a church-rate accounting "for all monies collected or received by him on account of the said rate, as also on all and every other rate or rates thereafter to be made and collected by him," it was held, that the sureties were only answerable for his accounting during one year, because such appeared to be the meaning of the parties as expressed in the recital of the condition.

Lord ELLENBOROUGH. I fully accede to these cases. They apply to the time for which sureties shall be liable, and where this is definitely marked out in the recital of the condition, it is not to be extended by any subsequent general words. Here had the condition only referred to the acceptances mentioned in the recital, I should have thought the defendant liable for one set of bills accepted by the plaintiffs on account of W. Bell, and no more. But a new subject matter is afterwards introduced; and the guarantie is extended to *any other account thereafter to subsist between them*, without any limitation of time, or restriction as to the nature of the transaction. An expanded liability is thus created. —The inquiry must be taken for all such sums to the amount of 10,000*l.* as the plaintiffs can shew to be on any account due to them from W. Bell.

Verdict accordingly.

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Dampier and *Moore* for the plaintiffs.

Gaselee for the defendant.

[Attornies, *Bleasdale* and *Westons.*]

All the authorities upon this subject will be found referred to in the two cases above cited.

Saturday, March 4.

VAN OMERON *v.* DOWICK and others.

Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven, for the benefit of the shippers: and if he does so, though acting bonâ fide for the interest of all concerned, this is a tortious conversion, for which the ship-owner is liable.

THIS was an action against the defendants as owners of the ship *Ranger*, on a bill of lading signed by their captain, for two cases of cutlasses, to be carried from England to Surinam, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted."

The *Ranger* sailed in June 1807, under convoy of the *Julia* sloop of war, with a large fleet for the *West Indies*, among whom were four vessels for *Surinam* besides herself. She strictly followed during the voyage the directions of the commodore, whose duty it was to inform different ships when they were to separate for their respective ports of destination. Through the error of the commodore, the Surinam ships got to leeward of that settlement, and having ineffectually attempted to beat up to windward,

windward, were forced to put into Demerara in the end of August, and to remain there till the month of December, when a ship of war came to see them back to Surinam. They sailed with her; but after nine or ten days beating about, were carried farther to leeward. The commodore then finding the attempt hopeless, ordered them to make for Tobago or Grenada. The Ranger put into the latter island, where the goods in question were sold by public auction, under the directions of the captain.

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The Attorney General for the defendant contended, that the captain, under such difficult circumstances, was to be considered the agent of the shipper as well as the ship-owner, and that he had a discretionary authority to do what was best for all concerned. But it was clearly for the benefit of the plaintiff that the cutlasses should be sold at Grenada, since they could not be carried to Surinam. He could therefore only claim the sum for which they were sold, and this action could not be maintained. The defendants had not been guilty of any breach of their undertaking, for the ship had done every thing that was possible to reach Surinam, and had been prevented from delivering the goods there by one of the risks excepted in the bill of lading.

Lord ELLENBOROUGH. I am decidedly of opinion that you had no right to sell the goods. Expediency might require this step; but the captain could not put himself in the situation of the owner of the goods; and when he thus disposed of them, in

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in point of law he was guilty of a tortious conversion. Whatever power he might have to sell a part of the cargo for repairs, he could not lawfully put a stop to the voyage; and it is difficult to say that there was a natural impossibility of proceeding to Surinam.

On proof that goods which cannot be exported without a licence, were entered for exportation at the custom-house, it will be presumed that there was a licence to export them.

An objection was then stated, that cutlasses are contraband of war, the exportation of which is prohibited without a licence from the king, and that no such licence was here produced.

Lord ELLENBOROUGH said, if it were proved that these cutlasses were entered at the custom-house, he would presume *omnia rite acta*.

A Judge at Nisi Prius will not take judicial notice of the King's proclamations.

No evidence of this fact could be found: but it turned out, that by 33 G. 3. c. 2. the king is only authorized to prohibit the exportation of implements of war by proclamation; and the defendant not being prepared with the gazette containing the proclamation for this purpose, the plaintiff had a verdict (*a*).

Garrow and *Le Blanc* for the plaintiff.

The Attorney General and *Wigley* for the defendants.

[Attornies, *Shawes & Le Blanc*, and *Willett & Annesley*.]

(*a*) *Vide* Rex *v.* Holt, 5 T. R. 436. Bul. N. P. 226. Parkin *v.* Dick, *post*.

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PEACOCK v. PEACOCK.

A father established in business, on his son's coming of age, tells him he shall have a share in it, and holds him out to the world as his co-partner: The son acts as such for several years; but there is never any thing settled as to the particular share which he shall have.—Under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers; but not that the son is entitled to a moiety of the profits; and it will be referred to a jury to say, to what share he is reasonably entitled.

THIS was an issue out of Chancery, to try whether the plaintiff was beneficially a partner with the defendant during the last five years, and if he was, for what share not exceeding one moiety of the profits.

The defendant is a law stationer, who has for many years carried on that business to a great extent in Chancery Lane. The plaintiff is his son, and was bred up by him in the same business. In March 1803, the plaintiff came of age, when his father said to him, "You shall have 15s. a week till October; the books will then be made up, and you shall have *a share;* we need not talk of the share till October comes; we shall settle it then." Soon after, he told his apprentices, that his son being now of age would be as much their master as himself. When the 1st of October arrived, he changed the firm, wrote Peacocks over his door, opened a new set of books, and from that time in every possible way represented his son as his co-partner. The latter likewise acted in all respects as a partner, and applied to business with assiduity and steadiness. But no settlement ever took place as to what share the son should have. Till 1806 he continued to take only 15s. a week from the receipts. The defendant then said, that from not keeping regular accounts he did not know what his profits were, and could not ascertain the share his son should have; but that till some arrangement was

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was formed his son should take £. 1. a week, and he himself should take £. 8. a week, out of which he was to defray the expences of the establishment. They went on nearly on this footing till within a few months back; when a quarrel taking place, the father turned the son out of doors, and took in another partner, giving him a third of the business. The son then filed a bill in Chancery against the father as his co-partner, for a discovery and to account. The father in his answer denied the existence of the partnership; whereupon this issue was directed.

Park for the plaintiff contended that he was clearly a partner with his father, and that as the share to which he was entitled was left indefinite, the law must presume it to be a *moiety*.

The Attorney General contra, insisted, that although there was a partnership as between them and the rest of the world, yet as no terms of partnership were ever agreed upon, *inter se* the son was merely his father's servant, and entitled as such to a compensation for his work and labour.

Lord ELLENBOROUGH. The fiftieth part of the evidence adduced would have been sufficient to establish a partnership as between these parties and the rest of the world. This being established, the presumption of law is, that they are partners *inter se*. Such presumption might have been repelled. A man who renders himself liable to third persons as a partner, may in truth be the mere agent or servant of his supposed co-partner, and entitled only to fixed wages. But in the present case, the presumption

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presumption of law, instead of being repelled, is confirmed. The defendant evidently gave his son a beneficial interest in his business, leaving the amount to be settled when the books should be balanced. There is no pretence however for saying that the plaintiff is entitled to *a moiety* of the profits; and the jury must consider what is a fair and just proportion for the father to give, and the son to expect, after what has passed between them.

The jury found that, since October 1, 1803, the plaintiff had been entitled to a *fourth* part of the profits of the partnership trade.

Park, *Marryat* and *Best* for the plaintiff.

The Attorney General, *Garrow* and *Richardson*, for the defendant.

[Attornies, Peacock and *Kaye & Freshfield.*]

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Monday, March 6.

JACKSON and others, assignees of ROBINSON, a bankrupt *v.* IRVIN and others.

A warrant, under a *fi. fa.* against the goods of a trader is directed to his servant and another person as special bailiffs: They in consequence take possession of the goods in his shop; but the business of the shop, though without the trader's interference, is carried on apparently as usual: While things are so situated, the trader commits an act of bankruptcy. Held, that the goods pass under the commission to the assignees; as the possession of the servant was the possession of the master, and the goods were thus in the *possession, order, and disposition* of the bankrupt at the time of the bankruptcy.

TROVER for goods taken in execution under a judgment against the bankrupt at the suit of the defendants.

Robinson was a mercer at Whitehaven in Cumberland. The defendants were his bankers, and to secure certain advances which they had made on his account, he gave them a warrant of attorney. Upon this they entered up judgment, and sued out a writ of *fieri facias*, indorsed to levy £. 4,000. There being no bound bailiffs in the County of Cumberland, the warrant from the Sheriff was directed to *J. Thompson* and *R. Strickett*, two of *Robinson*'s shopmen. The warrant was delivered to them on Saturday the 7th of May 1808, and they were desired to take possession of all *Robinson*'s stock in trade under it. There was evidence, which was contradicted, that *Thompson* had left *Robinson*'s service six weeks before. Having got the warrant, *Thompson* and *Strickett* remained in the shop till night, when they locked it, and carried away the key. But on the Monday morning, they again opened it, and although *Robinson* did not interfere, business was carried on apparently as usual. On the evening of this day, *Robinson* committed an act of bankruptcy by assigning all his effects by deed to *Jackson*, one of the plaintiffs. A commission of bankrupt was sued out against him the 14th of the same month, on the petition of

of one *Ritson*. The goods were afterwards sold by public auction under the warrant, *Thompson* and *Strickett* having remained in possession from the time it was delivered to them.—The question, of course, was, whether the bankruptcy should override the execution?

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Lord ELLENBOROUGH. How can the possession of the servants be adverse to that of their master? Even supposing that *Thompson* had left Robinson's service before the execution, still *Strickett* continued in it; and as he was tenant in common with the other, there was a continuance of the master's possession through him. The goods were certainly in *the possession, order, and disposition* (*a*) of the bankrupt when the bankruptcy happened, and therefore passed to his assignees, notwithstanding the execution. I remember an execution in the north, where the warrant was delivered to a gentleman's butler, who continued to serve up wine, and to wait at his master's table as before. The Court has more than once expressed an opinion, that there ought to be bound bailiffs in Cumberland as in other counties. They seem to have supposed here, that a possession *aliene* to the master's dissolved the relation between him and his servants; but they were wrong in point of law. Had they delivered the warrant on the 7th, to a bound bailiff, and put him in possession, all would have been right.

(*a*) 21 Jac. 1. c. 19. § 11.

Topping for the defendants then objected, that the action could not be maintained, as the assign-

A trader commits an act of bankruptcy, by assigning all his stock in trade to *A.* who is a party to the deed of assignment. Although *A.* cannot himself sue out a commission of bankrupt against him, upon this act of bankruptcy, he may act as an assignee under commission sued out upon it by a third person.

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ment relied upon as an act of bankruptcy was to *Jackson*, the plaintiff, who could not complain of a deed to which he was a party.

Lord ELLENBOROUGH. *Jackson* could not have been the petitioning creditor; but there is nothing to prevent his acting as an assignee under a commission sued out on the petition of another person who was no party to the deed (*a*).

In an action by the assignees of a bankrupt, upon proof that the petitioning creditor's debt once existed, the law will presume that it continued down to the time of the bankruptcy.

An objection was likewise taken to the evidence of the petitioning creditor's debt.—An entry in the bankrupt's books was relied upon, made some months before the act of bankruptcy. This stated him to be then indebted to Ritson above 200*l.*; but there was no evidence that the debt continued down to the time of the bankruptcy. However, Lord ELLENBOROUGH held, that the debt being proved to have once existed, its continuance would be presumed.

The plaintiffs had a verdict.

The Attorney General, Garrow, Park, and *Scarlett,* for the plaintiffs.

Topping, Littledale, Raine, and *Richardson,* for the defendants.

[Attornies, *Clennell* and *Falcon.*]

(*a*) In Bamford v. Baron, 2 T. R. 594, *n.* in which it was decided, that they who are privy to a fraudulent deed of assignment cannot set it up as an act of bankruptcy, the commission was sued out by the very persons who were privy to the deed.

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COHEN v. HINCKLEY.

Monday, March 6.

In an action on a policy of insurance, where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the plaintiff must prove that when she left the port of outfit she was bound upon the voyage insured. For this purpose the convoy bond, mentioning the port of destination in the common form, is *prima facie* evidence.

THIS was an action on a policy of insurance on the ship Union, at and from Portsmouth to Quebec. The declaration stated, that after the ship set sail from Portsmouth, and before her arrival at Quebec, she was wholly lost by the perils of the sea.

As the plaintiff's case was at first shaped, the only evidence of the loss was given by the plaintiff's son, who swore, that on the 8th or 9th of May 1806, he saw the Union at Portsmouth, in Stoke's Bay, going out with other ships for Spithead, and that she had never afterwards been heard of.

The Attorney General objected, that this did not prove that the ship ever sailed from Portsmouth, and still less that she ever sailed for Quebec.

Garrow contended, that it was the best evidence the nature of the case admitted of; that the presumption from the facts proved was, that the ship had perished on the voyage to Quebec, and that the policy being "*at* and from Portsmouth," the loss was covered by it, even supposing that the ship sunk while she lay there.

Lord ELLENBOROUGH. Even in that case you must have shewn, that she was *at Portsmouth*, on the voyage insured. But the declaration states, that

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the loss happened after the ship sailed from Portsmouth to Quebec. You must give some evidence that she sailed from the one place to the other. But when she left Stoke's Bay, how do I know that she was not bound to the East Indies? If you could shew that she had a particular destination by charter-party, I should presume that she sailed on the chartered voyage; or if you could shew that she was cleared out for a particular port, I should presume that she set sail for it when she dropped from her moorings. But you have laid no foundation for any presumption upon this subject, either one way or another.

The *convoy bond* was then put in, which had been executed at the custom-house by the plaintiff as owner, and Christopher Rowland as Captain of the Union, on the 28th of April 1806. In the body of this instrument no mention whatever is made of the place to which the ship was bound, the parties merely engaging that she should not sail without, nor depart from, convoy without leave; but at the bottom of it these words were written—"*Convoy* "*bond for Quebec.*" An officer from the customs stated, that it was according to the course of office to write these words upon the bond, and that though he did not personally know of any act of office being done upon it, he had no doubt that a certificate and other papers for a voyage to *Quebec* were delivered to the captain before he sailed.

Lord ELLENBOROUGH. I think this is sufficient *primâ facie* evidence that the ship sailed on the voyage insured.

It

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It afterwards appeared, however, that she sailed without convoy, and that the plaintiff was privy to this fact, so that by 43 G. 3. c. 57. s. 4. the policy was vacated, and the defendant had a verdict.

Garrow, *Topping*, and *Taddy* for the plaintiff.

The Attorney General and *Park* for the defendant.

[Attornies, *Palmer & Co.* and *Crowder & Co.*]

Vide Green v. Brown, 2 Stra. 1199. Newby v. Read, Park, 85, 5th ed. Twemlow v. Oswin, *post*.

BORRODAILE and another q. t. *v.* **MIDDLETON.**

Tuesday, March 7.

In an action for usury, the forbearance was laid to have been from the 21st of April. On that day, the borrower received from the defendant, as part of the sum lent, a cheque, which was void for want of a stamp. This the borrower the same day paid into his bankers, who immediately gave him credit for the amount, but who did not themselves receive payment of it till the following day.—Held, that as to this sum there was no forbearance till the 23d, and that there was thus a fatal variance between the declaration and the evidence.

THIS was an action for usury against the same defendant, and upon the same transaction, as in the case of *Brooke q. t.* v. *Middleton*, *ante*, vol. 1. p. 444. The declaration now stated, that the defendant forbore to *Wilkins and Lacy* the sum of 242 *l.* 7 *s.* from the 21st [instead of the 20th] of April 1807, to the 5th of November following.

It was proved, that *W.* and *L.*, on the 21st of April, received in London a letter from the defen-

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dant, sent from Frome in Somersetshire on the 20th, containing various cash notes for the sum of 242*l.* 7*s.*, and that on the 21st they actually received cash for the whole of them, *except one*. This was a cheque for 26*l.* 8 *s.* upon Messrs. Hammersley and Co. bankers in London, drawn by Lord Cork at Frome, payable to one John King. The paper on which the cheque was drawn was unstamped. *W.* and *L.* on the 21st paid it into their bankers, Sansom & Co. who immediately gave them credit for the amount. But Sansom & Co. did not present it for payment till the 22d. On that day it was duly paid by Hammersley & Co.

The Attorney General objected, that as to this sum of 26*l.* 8*s.* there could be no forbearance from the 21st, and that there was still a fatal variance between the declaration and the evidence. The cheque being drawn by Lord Cork at such a distance from the bankers who were to pay it, was void. Therefore, the facts of its being remitted to *Wilkins and Lacy*, and its being paid in by them to their bankers, went for nothing, and there was no loan or forbearance by the defendant of the 26*l.* 8 *s.* till the 22d of April.

Garrow, *contra*, contended, that though Lord Cork would not have been liable upon this cheque, the defendant was precluded from contesting its validity after he himself had sent it as cash, it had been received as cash by *W.* and *L.*, and their bankers had given them credit on the strength of it. Thus, in fact, it had operated as cash, and being

being regularly paid, the forbearance might well be laid from the 21st, when *W.* and *L.* found it available for 26 *l.* 8 *s.*

Lord ELLENBOROUGH. The cheque was void in its creation. It is a mere blank. I have not legal optics to see its existence. Money was paid on the 22d, and it was from that day only that the forbearance commenced as to this sum. The cheque is a mere nullity. If it had been lost on the 21st, it would have been the loss of a piece of straw. I should have been disposed to reserve the point had I thought it doubtful; but my opinion is so clear, that I must direct the plaintiff to be called.

Nonsuit.

Garrow, Jervis, and *Marryat* for the plaintiffs.

The Attorney General and *Lawes* for the defendant.

[Attornies, *Walton* and *Swain.*]

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Wednesday, March 8.

HAYWARD and others *v.* SCOUGALL and others.

A. sold to *B.* all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by *C.* the agent of the concern.—*C.* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons. Held, that the contract must be confined to such hemp as *C.* should ship as agent to *A.*, and that *A.* was not answerable to *B.* for more than the 71 tons.

THIS was an action for the non-delivery of hemp.

The agreement between the parties upon this subject was as follows: "Sold for Messrs. Scougall & Co. to Messrs. Hayward & Co. all the sound merchantable Riga Ryne hemp that may be loaded by the Pilgrim, Webster, and one or two other ships, not exceeding 300 tons, now at Riga, *by the supercargo of the said vessels, or Messrs. Schmids & Co. the agents of the concern*, the names of the ships to be given up when received, at 81 *l.* per ton, &c."

The names of two other ships were subsequently mentioned, pursuant to the agreement; but when they arrived, along with the *Pilgrim*, it appeared, that although Messrs. Schmids had loaded each of them with a full cargo of hemp, they had shipped by them not more than 71 tons on account of the defendants. This quantity was delivered to the plaintiffs; and the question was, whether the defendants were not bound to deliver 300 tons, so much having been shipped on board of these vessels by Messrs. Schmids at Riga. It appeared that these gentlemen are agents for various other Russia merchants, besides the defendants.

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The Attorney General for the plaintiffs contended, that it was immaterial on whose account the hemp might have been shipped. The agreement purported an absolute sale of all that should be loaded by Messrs. Schmids to the amount of 300 tons. It was the same as if the agents had never been mentioned, and there had been simply a sale of the cargo of the ships named. This agreement might be improvident, but the defendants could not escape from it. If a man voluntarily covenanted to do what was impossible, he was liable for a breach of his covenant. This was precisely like the case tried yesterday, in which Lord Ellenborough held, that a man was liable upon such a contract, although he had actually purchased the hemp at Petersburgh, and he was prevented from delivering it in this country, from its being seized and confiscated by the Russian government (*a*).

Lord

(*a*) *Splidt* v. *Heath and others. Guildhall Sittings*, 7th March 1809. Action for not delivering certain quantities of Petersburgh hemp, sold by the defendants to the plaintiff, *to be shipped on or before the* 31*st of August, old style*, by ship or ships, the names of which were to be given up when known. The Wilberforce and the Alfred were afterwards mentioned as the names of the ships; but they arrived with only a very small portion of the hemp on board. It was stated by way of defence, that the defendants had prepared a full cargo of hemp for these two ships, which would have been much more than sufficient to satisfy the contract; but that while it was coming down in lighters from Petersburgh to Cronstadt, it was seized by the Russian government, and confiscated as British property; and that the ships which were to have taken it on board were obliged

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Lord ELLENBOROUGH. As all the hemp which the Schmids were to ship at Riga was not to belong to the defendants, this renders it improbable that they should mean to sell what was not their own. In the case alluded to, the party had agreed to ship and deliver a certain quantity of hemp, and, to be sure, nothing could excuse him from doing so. But here the defendants only sold what they supposed their agents would ship for them. No doubt they expected Schmids & Co. to ship at least 300 tons of hemp on their account; but they were disappointed. They seem to have contemplated the possibility of this. They say, in substance, "We will sell you all that our agents at Riga ship for us, to the amount of 300 tons. If they send us so much you shall have it; if they send us none, we have sold none to you." The words employed are by no means strong enough to intimate, that they had undertaken to sell that which did not belong to them, and over which they had no controul. They only refer to the hemp shipped by Schmid & Co. as their own agents. "Agents of

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(a) 10 East. 530.

to cut their cables and put to sea, to avoid the embargo. It was argued, therefore, that the defendants were not liable for the effects of the confiscation and embargo, which had prevented the hemp from being shipped by the 31st of August. But Lord ELLENBOROUGH said this case was decided by Atkinson v. Ritchie (a), which was likewise a case of extreme hardship, and as the defendants had absolutely engaged that the hemp should be shipped, they were liable for this not being done, from whatever cause the circumstance had arisen.—The plaintiff had a verdict.

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the concern," must mean agents *quoad hoc*, not general agents in the Baltic trade.

Plaintiffs nonsuited.

The Attorney General, *Garrow*, and *Taddy* for the plaintiffs.

Park, *Topping*, and *Richardson* for the defendants.

[Attorneys, *Keys & Freshfield* and *Dennett & Greaves.*]

PARKIN *v.* TUNNO.

Thursday, March 9.

THIS was an action on a policy of insurance on goods on board the ship *Laurel*, "at and from Bristol to Monte Video, and any other port or ports in the river Plate, in possession of the English." The plaintiff went for an average loss by the perils of the sea.

If a ship insured, on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. Goods insured to *A.*, that port being in the hands of the enemy, are carried to *B.* and afterwards to *C.* Their condition being here inspected for the first time from the original sailing of the ship, they are found to be almost entirely destroyed by sea-damage, which might have happened partly in the voyage to *A.* or entirely in passing from *A.* to *C.* The underwriters are not liable for any part of this loss, there being no distinct evidence that the goods were injured while they were protected by the policy.

The ship sailed from Bristol on the 15th July 1807, with the goods insured, consisting of bottled porter, cheese, and other provisions. When off the coast of Brazil, she encountered several very heavy gales of wind, and was in danger of foundering.

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dering. On the 15th of October, the weather having moderated, she entered the river Plate. By this time, Monte Video and every other place in the river Plate, except Maldonado, were in the hands of the Spaniards, with whom we were then at war. The Laurel sailed for Maldonado; but upon her arrival off that port, she was immediately ordered to sea by the English commander there, without being able to unload any part of her cargo, or to receive any repair. She then made for Rio Janeiro, as the nearest place of safety; and having taken in water, she proceeded from thence to Trinidad, where she arrived on the 12th of January 1808, after a very tempestuous passage. Now, for the first time since her leaving Bristol, her hold was opened, and her cargo inspected. The bottles which had contained the porter were found almost all either broken or empty, and the cheese and other provisions so much injured by the salt water, as to be of little or no value. But the witnesses examined were unable to ascertain when the goods had suffered in this manner. They said, that while off Brazil the Laurel shipped a great deal of water, and that the damage was probably done partly before she reached Maldonado, and partly in the subsequent portion of the voyage.

The Attorney General, for the plaintiff, first contended, that the underwriters were liable for all the damage which should be supposed to have happened to the goods till the ship's arrival at Rio Janeiro. As all the places of her destination, except Maldonado, were in the hands of the enemy, and

and she was prevented from landing her cargo there by the English commander, whose orders she was bound to obey, the goods were still protected by the policy till she reached a place of safety.

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Lord ELLENBOROUGH. The ship's going to Rio Janeiro might be the most prudent measure that could be taken under the circumstances; but I am clearly of opinion, that the underwriters were off the policy the moment she sailed from Maldonado. They undertook to indemnify the assured for any loss that should happen in a specific voyage, and their undertaking cannot be enlarged by implication, nowever necessary it might be that the voyage should be altered. I cannot add to the terms of the policy, "or if the said ship cannot enter any port in the river Plate, then till she shall reach a port of safety elsewhere."—For any damage the cargo can be shewn to have suffered in the voyage from Bristol to Maldonado, the assured have an undoubted right to recover; but upon the evidence as it now stands, I do not see that it is possible for the jury to determine whether the goods did sustain any, and if any, what damage, while they were protected by this policy.

The Attorney General answered, that the best evidence had been given which the nature of the case admitted; and the jury must estimate the damages according to the rules of probability. A jury was sometimes called upon to form a certain conclusion upon more uncertain premises; as in the well known case of a father and son, who were hanged together

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together on the same gibbet, where it became necessary to decide which of them was the survivor. Here the jury must ascribe the damage to the different parts of the voyage, according to the best of their judgment. The plaintiff had effected another policy on the goods from the river Plate to the ship's port of discharge in the West Indies: but the second set of underwriters might equally well say, that it was uncertain whether any and what portion of the damage was sustained between Maldonado and Trinidad.

Lord ELLENBOROUGH. Primâ facie the damage is referable to the second policy, unless the underwriters can shew that it happened before their liability attached. Most likely a part of it was occasioned by the tempestuous weather the ship experienced in sailing to the river Plate; but there is no proof of this, and no evidence is adduced that the jury can safely proceed upon. The burthen lies upon the plaintiff to shew specifically, that the goods insured were damaged by a peril against which the defendant is bound to indemnify him.

Plaintiff nonsuited.

In the ensuing term, the *Attorney General* moved to set aside the nonsuit on both the grounds taken at the trial: but the other Judges concurred in opinion with the CHIEF JUSTICE, that the risk ended at Maldonado, and that as the state of the cargo had never been examined till the ship reached Trinidad, there was no sufficient evidence for the jury

jury to presume that any part of the damage had happened while the policy remained in force.— *Rule nisi refused.*

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PARKIN v. TUNNO.

The Attorney General, Park, and *Taddy,* for the plaintiff.

Garrow, Scarlett, and *F. Pollock,* for the defendant.

[Attornies, *Palmer* and *Blunt.*]

Vide Blackenhagen *v.* the London Assurance Co. *ante,* vol. 1. p. 454, and the cases there referred to.

KIST and others *v.* ATKINSON and others.

Friday, March 10.

THIS was an action for commission alleged to be due to the plaintiffs in respect of a cargo of wheat they had shipped for the defendants from Konigsberg to London.

It is agreed between *A.* and *B.* that *A.* for certain commission shall ship a cargo of wheat, of a specific quality, at a foreign port for *B.* in England. The wheat shipped by *A.* being found upon its arrival to be of an inferior quality, *B.* brings an action against *A.* for a breach of the agreement, and recovers damages.—Held, that *A.* cannot afterwards maintain an action against *B.* for the commission, as his claim for this might have been given in evidence in the former action to reduce the damages.

When the wheat in question arrived, the defendants insisted it was of a much inferior quality to that which they had ordered. They therefore sold it under protest on account of the plaintiffs, and afterwards

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afterwards brought an action against them for breach of contract, in which they recovered 399 *l.* 9 *s.*

Garrow contended, that the plaintiffs had now a clear right to their commission, according to the terms of the contract. For any damage which the defendants had sustsined by the bad quality of the wheat, they had received a full compensation. Therefore things stood between the parties exactly as if the wheat had been of the quality ordered, and the agreement had been in all respects fulfilled on the part of the plaintiffs.

Lord ELLENBOROUGH. The facts which the present plaintiffs now rely upon might have been given in evidence, to reduce the damages when they were defendants. I consider the account as closed between the parties by the former verdict.

Plaintiffs nonsuited.

Garrow, Topping, and *Parnther* for the plaintiffs.

Park and *Taddy* for the defendants.

[Attornies, *Druce* and *Palmer & Co.*]

Vide Basten v. Butter, 7 East. 479. Fisher v. Samuda, *ante*, vol. I. p. 190.

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DE TASTET and others *v.* BARING and others.

Friday, March 10.

Bills of exchange upon Lisbon were indorsed by *A.* to *B.* in this country, and afterwards by *B.* to *C.* a merchant at Lisbon. When the bills became due, Lisbon was in the hands of the French, and they were dishonoured. *C.* re-drew upon *B.* in London, but *B.* did not honour the re-drafts. It did not appear clearly whether at that time there was an established course of exchange between Lisbon and London. In an action by *B.* against *A.* upon the bills, the plaintiffs' claim to re-exchange was disallowed by the jury, and the court afterwards refused to set aside the verdict upon that ground.

THIS was an action by the indorsees against the indorsers of two bills of exchange, drawn in London by J. Hodgson upon Joze Luiz da Silva at Lisbon, each for the sum of 2220 mil, 767 reis, and falling due, the one the 30th of November, the other the 30th of December, 1807.

It was admitted, that the defendants were liable as indorsers of these bills, and that the plaintiffs as indorsees had been paid principal, interest, and all charges, *except re-exchange*. The question between the parties was, whether the plaintiffs were entitled to recover any and what re-exchange on both or either of the bills.

On the 7th of April 1807, a few days after purchasing these bills from the defendants, the plaintiffs indorsed them and remitted them to Messrs. Jeronimo Rebeiro, Neaves, & Co. at Lisbon, by whom they were presented for payment. Before either of them became due the French had taken possession of Lisbon, and the English were excluded from Portugal. However, Messrs. Jeronimo Rebeiro, Neaves, & Co. re-drew upon the plaintiffs in respect of the bills in question; one re-draft being dated 24th December 1807, and the other 30th January, 1808. Both were drawn at the exchange

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of 68,—the bills having been negotiated in this country at 62,—thus making a difference of 6*d.* per milrei (*a*). When the re-drafts arrived in London, they were dishonoured by the plaintiffs.

(*a*) Sum paid defendants for the bills 1147*l.* 8*s.* Sum demanded, 1271*l.* 13*s.* 4*d.*

Garrow for the defendants contended, that Portugal being an enemy's country at the time when these bills became due, no British subject was liable for re-exchange upon them; and that at any rate no claim for re-exchange could be set up by the present plaintiffs, as they had refused to pay any to their indorsees, and therefore were not damnified in this respect by the dishonour of the bills.

The Attorney General answered, that the plaintiffs, however they might have refused to accept the re-drafts, were clearly themselves liable for re-exchange to Messrs. Rebeiro, Neaves, & Co. By indorsing the bills, they had undertaken that this house on certain days should receive at Lisbon certain sums of Portugueze money, either from Da Silva, the acceptor of the bills, or failing him, from any person who would advance the money upon drafts on the plaintiffs at the current exchange of the day. Da Silva's property being seized by the French, he was unable to pay, and the holders of the bills had therefore an undoubted right to resort to the other alternative of the indorsers' obligation, and to raise the sums specified in the bills by re-drawing upon London, however disadvantageous the exchange might be. If the plaintiffs had refused to accept the re-drafts, they might

might be compelled to pay the amount of them by an action on the bills. Having thus incurred a liability for re-exchange by the dishonour of the bills, they had a right to come upon the defendants, who were their indorsers, and had contracted the same engagement with them which they themselves had with their indorsees at Lisbon. It would have been no answer with respect to the principal money, that that had not been paid by the plaintiffs. No more was it as to the re-exchange. In both cases a liability to pay when legally called upon, was sufficient.

Lord ELLENBOROUGH observed, that the question must depend upon the usage of merchants, and directed the jury to find for the plaintiffs, if they had either paid or become liable for re-exchange themselves.

A full special jury, after some deliberation, found a verdict for the defendants, which the court afterwards refused to set aside.

The Attorney General and *Littledale* for the plaintiffs.

Garrow and *Marryat* for the defendants.

[Attornies, *Cooper & Lowe* and *Gregson & Dixon.*]

Vide Mellish *v.* Simeon, 2 H. Bl. 378. Pollard *v.* Herries, 3 B. & P. 335.

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Saturday, March 11.

DUNCAN *v.* SKIPWITH.

A residing at *X.* employs *B.* residing at *Y.* to procure payment of a bill there, and to remit the produce direct to him at *X.*—*B.* receives payment of the bill, but remits the produce to a third person at *Z.* for *A.*'s use, whereby the whole gets into the hands of *A.*'s creditors. *A.* cannot maintain an action for money had and received against *B.* to recover the amount of the sum received in payment of the bill.

MONEY had and received. Plea, the general issue.

Taddy for the plaintiff stated, that the action was brought to recover a sum of money which the defendant had received in payment of a French *ordonance* (a negotiable instrument in the nature of our navy bills), which had been drawn by General Le Clerc, at St. Domingo, on the minister of the marine at Paris, in favour of one Taylor, and had been assigned for a valuable consideration to the plaintiff, a merchant at Fredericksburgh in Virginia. The defendant then residing at Paris as a diplomatic agent of the American government, the plaintiff employed him to procure payment of this instrument, and desired that he would remit the money direct to him at Fredericksburgh. The *ordonance* was duly honoured by the French government; but the defendant, instead of obeying his instructions, remitted the proceeds in bills, payable to the plaintiff's order, to Mr. Paterson, president of the bank at Baltimore. The consequence was, that the plaintiff's creditors had got possession of these bills, under a pretended authority derived from a deed of trust. But as the defendant had not remitted the money in the manner required, he must still be supposed to have it in his hands, as he had received it,—for the plaintiff's use.

Lord

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DUNCAN v. SKIPWITH.

Lord ELLENBOROUGH. Having no special count for misconduct, you fail *in limine*. Besides, the defendant had a lien upon the money received from the French government for his commission, and was not bound to part with it till that was satisfied. In short, you have no declaration to sustain your case; and you have no case to be sustained, if you had a declaration.

Plaintiff nonsuited.

Taddy for the plaintiff.

Garrow and *Park* for the defendant.

[Attornies, *Westons* and *Dance*.]

MARSHALL *v.* PARKER.

Saturday, March 11.

THIS was an action on a policy of insurance on fish valued at 1150*l.* on board the Danish ship Cupido, from Mount's Bay to Leghorn.

The sentence of condemnation of a foreign court of Admiralty cannot be received in evidence, without previous proof of the ship having been captured.—A licence is prima facie evidence, that when a ship left her port of outfit,

J. Warren for the plaintiff, at first satisfied himself with proving, that a cargo of pilchards was put on board the Cupido in Mount's Bay, and putting in a minute of council, which directed a licence to be granted for this ship to carry a cargo of pilchards

she sailed upon the voyage insured.—Goods protected by a valued policy, being captured, are condemned as lawful prize, *the captors paying the freight*. The assured may nevertheless recover as for a total loss.

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to Leghorn, and a sentence of the French Admiralty Court, whereby the cargo of the Cupido was adjudged good prize, the captors paying freight to the captain, to whom the vessel was ordered to be restored.

Garrow for the defendant objected, that there was no evidence of the ship having ever sailed on the voyage insured, and that the sentence was not by itself sufficient evidence of the capture.

Lord ELLENBOROUGH. From the licence, we may presume that the ship sailed for Leghorn (*a*); but certainly the plaintiff has not proved that she was captured on her way thither. You must lay a foundation for the sentence. At present it is merely *in vacuo*. Prove a capture, and I will receive the sentence as evidence of the facts on which the condemnation proceeded.

A witness was then called, who stated, that the ship was taken by a French privateer within a short distance of Leghorn; that she was carried into that port, and that the cargo was there sold by Darby & Co. to whom it had been originally consigned.

Garrow contended, that as the cargo had reached its destination, the underwriters were discharged; and that at any rate they could not be liable for the full sum of 1150*l.*, as the freight, which was

(*a*) *Vide* Cohen *v.* Hinckley, *ante*, 51. Twemlow *v.* Oswin, *post*.

included

included in the valuation, was to be paid, not by the assured, but by the captors.

Lord ELLENBOROUGH. The cargo was intercepted on the voyage insured, and though carried into Leghorn, and sold by the consignees, this is the same as if it had been carried into any other hostile port, and disposed of in any other manner. It never reached the agents of the assured. The sale was for the benefit of the captors.—Nor, without evidence of fraud, can I disturb the valuation,

Verdict for sum insured.

J. Warren for the plaintiff.

Garrow, *Park*, and *Scarlett* for the defendant.

[Attornies, *Wadeson* and *Rigby*.]

Vide Shawe v. Felton, 2 East. 109.

COURT OF COMMON PLEAS.

1809.

SITTINGS AFTER TERM AT WESTMINSTER.

Saturday, Feb. 18.

FINNERTY *v.* TIPPER.

In an action for a libel, the plaintiff cannot give in evidence other libels published concerning him by the defendant, unless they directly refer to the libel set out in the declaration.

THIS was an action for a libel published in a periodical work, called "The Satirist, or Monthly Meteor," which stated (amongst other things), that the plaintiff being prosecuted by the Attorney General, had fled the country, that he might save himself from the pillory.

In addition to the libel set out in the declaration, the plaintiff's counsel proposed to read extracts from subsequent numbers of "The Satirist," to prove the malicious motive with which the former libel had been published.

Sir JAMES MANSFIELD, C. J. Unless the subsequent publications expressly refer to the libel for which the action is brought, they cannot be read. You might as well give in evidence one highway-robbery on the trial of another.

Best,

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Best, Serjeant, *Clifford*, and *Adolphus* contended, that the subsequent publications were admissible to shew, *quo animo* the defendant had published the libel declared upon. They were not offered as part of the present cause of action, or to aggravate the damages. If the plaintiff wished to recover a compensation for any injury he had sustained by them, he was certainly bound to bring a fresh action. But they might clearly be used to explain the defendant's act in publishing the original libel. For this purpose, in actions like the present, subsequent libels and subsequent words of defamation were constantly received in evidence. In a late case in *Campbell's Reports*, this point had been so ruled by Lord Ellenborough, in an action for words (*a*). So, in the case of Carr v. Hood, which was an action for a libel contained in the second edition of a book called "My Pocket Book," the first, second, and third editions of that book were received in evidence, and likewise a *number* of the Monthly Mirror, a work published by the same defendant, in which he continued to abuse the plaintiff, Sir John Carr. The same doctrine was recently held by the whole court of K. B. in the case of Tate v. Humphrey (*b*), from the Oxford Circuit.

(*a*) Rustell *v.* M'Quister, 1 Campb. 49.

(*b*) *Tate v. Humphrey*, Her. Lent Assizes, 1808. Cor. GRAHAM, B. Action for words of perjury. To shew the *quo animo*, the plaintiff offered in evidence a bill of indictment which had been subsequently preferred by the defendant against him, and which the grand jury returned *ignoramus*. The defendant's counsel

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Circuit. Even in criminal cases the same principle was recognized. Thus, in *The King v. Hart*, the editor of the Independent Whig, when the defendant came up for judgment, many papers were read which had been published subsequent to the libels set out in the information.

Sir JAMES MANSFIELD, C. J. I am still of the same opinion. If the doctrine contended for were to prevail, it might happen that the first libel might be almost nothing, while the second might contain the most shocking imputations; and the necessary consequence would be, that the jury would give damages for the second libel in an action for the first. Besides, with respect to the second libel, of whatever crimes it accuses a man, it may be true; and the defendant has no opportunity to prove the truth of it, unless it is made the subject of a distinct action. I do not say, that a subsequent publication may not so far refer to the subject of the declaration, as to permit it to be used in evidence; as, for instance, suppose a man published a libel, and afterwards published a paper, saying, that every thing in the libel was true, that would not be a new, distinct, and substantive libel, but might

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counsel objected, that this was the subject of an action for a malicious prosecution; but GRAHAM, B. received it as evidence to prove the malicious intent with which the words were spoken.—The following term an application was made to set aside the verdict for the plaintiff on this ground; but the Judges were of opinion, that the evidence had been properly admitted, and a new trial was refused.

be

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be read at the trial to prove the malice of the original publication. I do not think that any case can be authority, which goes farther. With the cases which have been actually cited, I am disposed to agree. I know that in actions for words it has been allowed to give evidence of words subsequently spoken; but I believe that has been restrained to words relating to the same subject. In an action for words of perjury, I do not believe that any judge has received in evidence words subsequently spoken by the defendant, accusing the plaintiff of murder. Upon consideration, I think the case before Mr. Baron Graham was rightly decided, inasmuch as the circumstance of preferring the indictment was there proved to shew the malice, and the indictment itself, in point of fact, merely repeated the words for which the action was brought. But had it been an indictment for a highway robbery, I should have thought very differently.—With regard to *Sir John Carr's case*, it has not the least relation to the one before me. That was an action by an author for a severe animadversion on some of his writings. The defence was, that this was written in the fair spirit of criticism, and that it was not published with a malicious intention to defame *Sir John Carr*. Therefore, the manner in which the work itself was sold, and any other papers published by the defendant, to shew that he was actuated by malice in publishing the libel complained of, were certainly admissible evidence. —I have looked at the passages now proposed to be read, and it would be the most monstrous injustice to the defendant to receive the whole of them

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them in evidence. You may read the sentence if you will. Farther you must not go.

The following sentence was read accordingly, from a Number of "The Satirist" published after the action was brought:—"We certainly did state in our last number, that we understood Peter Finnerty had quitted the country, and we had good grounds for believing that he had; but it now appears, that he merely spread a report of his absence, and remained concealed in London (*a*)."

It is not a bar to an action for a libel, that the plaintiff has been in the habit of libelling the defendant.

Shepherd, Serjeant, for the defendant, proposed to prove, by way of complete answer to the action, that the plaintiff had proposed, as a question for discussion in a public debating society, of which he was manager, "Whether the editor of the Satirist, or a notorious pickpocket, was the greater nuisance to society;" that he had caused boards, with the question printed upon them in large characters, to be carried through the streets; and that when the question came on, he took an active part in the debate, giving the decided preference to the pickpocket. These facts, it was contended, on the authority of *Anthony Pasquin's case*, before Lord Kenyon, would entitle the defendant to a verdict.

(*a*) *Vide* Mead v. Daubigny, Peak. Cas. 125. Lee v. Huson, ib. 166. Rex v. Ball, 1 Campb. 324.

Sir

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Sir JAMES MANSFIELD. I cannot go so far as Lord Kenyon is stated to have done. The decision of that case, I rather think, was incorrect in point of form, though it was correct in point of justice. If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself, and he cannot be supposed to suffer much injury from this source. But I cannot say that he suffers none, or that he loses his right to maintain any such action. The evidence opened does not amount to an absolute defence in law, but will be most essential with respect to the damages. If two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side.

Verdict for the plaintiff.—Damages 1*s*.

Best, Serjeant, *Clifford*, and *Adolphus*, for the plaintiff.

Shepherd, *Vaughan*, and *Manley*, Serjeants, for the defendants.

So in the case of *Crim. Con.* Lord Kenyon held, that the notorious, undisguised infidelity of the husband, was a complete bar to the action. Wyndham *v.* Lord Wycombe, 4 Esp. 16. But the better opinion seems now to be, that it only goes in mitigation of damages. Bromley *v.* Wallace, *ib.* 237.

1809.

ADJOURNED SITTINGS IN LONDON.

Wednesday, Feb. 22.

DOE ex d. PITCHER *v.* DONOVAN.

Premises are let from year to year, upon an agreement, that either party may determine the tenancy by a *quarter's notice.* This notice must expire at that period of the year when the tenancy commenced.

EJECTMENT for a house in Cock Court.

Pitcher had let this house to one Quelle, from year to year, upon an agreement *that either party might determine the tenancy by a quarter's notice.* Quelle entered at Michaelmas 1802, and occupied the premises for some time himself. He then underlet them to the defendant on the same terms on which he himself held them; and things continued on this footing for several years. But at Lady-day 1808, Quelle gave a written notice to Pitcher that he should deliver up possession of the premises to him at Midsummer following, and a similar notice to the defendant, to quit the premises at the same period. The question was, Whether this was a sufficient notice to determine the tenancy within the meaning of the agreement?

Manley, Serjeant, for the defendant, contended, that the tenancy had not been properly determined, as the quarter's notice ought to expire at that season of the year when the tenancy commenced; and cited, as in point, *Right ex d. Flower v. Darby*, 1 T. R. 159.

Best,

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Best, Serjeant, *contra*, insisted, that although in the common case of a tenancy from year to year, there must be half a year's notice to quit, expiring at that season of the year when the tenancy commenced; yet where it was expressly agreed between the parties, that a quarter's notice should be sufficient, their meaning must be taken to be, that the notice might expire at any of the four quarter-days when the rent was payable.

Sir JAMES MANSFIELD, C. J. saved the point; and the Court of C. P. being of opinion that the notice was insufficient, ordered a nonsuit to be entered.

Best, Serjeant, and *Hemming*, for the lessor of the plaintiff.

Manley, Serjeant, for the defendant.

[*Attornies, Dodd and Ledwick.*]

CHRISTIE *v.* GRIGGS.

Thursday, Feb. 23.

THIS was an action of assumpsit against the defendant as owner of the *Blackwall Stage*, on which the plaintiff, a pilot, was travelling to

In an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt; to prove negligence, it is *prima facie* enough to give evidence of the coach having broke down;—from which negligence will be inferred.—The proprietor of a stage coach is not answerable for any damage that may happen to a passenger, from the coach being overturned by a mere accident.

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London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed—there rested his case.

Best, Serjeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskilful, or of the coach being insufficient.

Sir JAMES MANSFIELD, C.J. I think the plaintiff has made a *primâ facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to shew, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could any where be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it

it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers *a mere accident*.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of every thing like negligence, the question for the jury would be—as to the sufficiency of the coach. If the axle-tree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

Vaughan, Serjeant, and *Roberts*, for the plaintiff.

Best, Serjeant, for the defendant.

[Attornies, *Brown* and *Sabine*.]

Vide Aston v. Heaven, 2 Esp. Cas. 533.

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Friday, Feb. 24.

In an action on the warranty of a horse, the plaintiff is not entitled to recover for the expence of keeping the horse, unless on discovering the unsoundness, he offered to return him to the defendant.

CASWELL *v.* COARE.

DECLARATION on the warranty of a horse, with counts for horsemeat, &c.

The unsoundness of the horse was clearly proved; and the chief question was, Whether the plaintiff was entitled to recover for his *keep* from the time when the unsoundness was discovered. He was then sent to a livery stable, and no offer had been made to return him to the defendant.

Best, Serjeant, contended, that the plaintiff had a right to recover for the keep as part of the damage he suffered from the breach of the warranty.

Sir JAMES MANSFIELD, C. J. I am of opinion that he has not. I remember when it was held, that an action could not be maintained upon the warranty, without an offer to return the horse. That doctrine is now exploded (*a*); but still, unless the defendant refuses to take back the horse, the plaintiff cannot complain that the expence of the keep is necessarily thrown upon him. By not offering to return the horse before bringing the action, he intimates that he still considers the animal as his own, and he therefore ought to maintain him at his own expence.

Verdict for the plaintiff.

Best, Serjeant, and *Reader*, for the plaintiff.

Cockell, Serjeant, and *Littledale*, for the defendant.

(*a*) Fielder *v.* Starkin, 1 H. Bl. 17.
Vide Curtis *v.* Hannay, 3 Esp. Cas. 82.

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LIVESAY *v.* HOOD and others, assignees of ALMOND, a bankrupt.

Monday, Feb. 27.

TROVER for divers quantities of hosiery.

Goods in the hands of a retail dealer *upon sale or return*, pass under a commission of bankrupt against him, by 21 Jac. 1. c. 19.

By an agreement between the plaintiff, a wholesale hosier, and Almond, a retail hosier, the former was to supply the latter with goods *upon sale or return*. Almond was constantly to have a stock of hosiery from the plaintiff to the value of 100 *l.* which he was to sell in his shop. The parties were to settle monthly; and Almond was to pay the plaintiff for the articles sold, at the invoice price, deducting 5 *l.* per cent. Goods were accordingly furnished under this agreement, and the bill of parcels which accompanied them was entitled "J. Almond *from* Livesay & Co." At the end of a month the account was settled; and Almond having paid the plaintiff for the articles which had been sold, according to the agreement, the stock was again made up to 100 *l.* About the end of the second month, Almond became bankrupt, and the defendants were chosen his assignees. There were then in his shop goods supplied under the agreement to the amount of 61 *l.* which the defendants seized as part of the bankrupt's effects, and refused to deliver up when demanded by the plaintiff.

Best, Serjeant, contended, that these goods vested in the assignees under 21 Jac. 1. c. 19. s. 11. as they

1809. had been in the possession, order, and disposition of the bankrupt at the time of his bankruptcy, with the permission and consent of the true owner.

LIVESAY v. HOOD.

Shepherd, Serjeant, *contra*, insisted, that Almond had possession of the goods only as a factor for the plaintiff; and that the case of a factor had always been considered as excluded from the provisions of this statute (*a*).

LAWRENCE, J. I think this is a case within the statute of *James*. Under the agreement, the bankrupt was to sell these goods, not as a factor, but as a principal. They appeared to the world as his property; and this reputed ownership was calculated to gain him a delusive credit, which it was the object of the statute to prevent.

Plaintiff nonsuited.

Shepherd, Serjeant, and *Marryat* for the plaintiff.

Best and *Vaughan*, Serjeants, for the defendant.

[Attornies, *Bell* and *Swain*.]

(*a*) Godfrey *v.* Furzo, 3 P. Wms. 185. Mace *v.* Cadell, Cowp. 233.

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TWEMLOW and others *v.* OSWIN.

Wednesday, March 1.

In an action on a policy from an English to a foreign port, to found a presumption that the ship was lost on the voyage, it is enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to shew, that she never arrived there.

THIS was an action on a policy of insurance on the ship commerce, at and from Liverpool to Miremachi, in the Gulf of St. Lawrence, and from thence to Hayti. The loss was laid in one count to be by captnre; in another, by the perils of the seas; and in both, to have happened before the ship reached Miremachi.

The ship sailed from Liverpool on the 14th of April 1807. On the 23d of July following, the plaintiffs, who reside at Liverpool, received a letter from their correspondent at Miremachi, dated June 11, stating that the ship had not then arrived, but was expected in a few days. The policy was effected on the 4th of August, when this letter was shewn to the underwriters. In addition to these facts, the plaintiffs proved, that they were the owners of the ship; and called one of their clerks, who swore she had not been heard of since.

Shepherd, Serjeant, contended, that the plaintiffs must be nonsuited unless they gave some further evidence of the loss of the ship. Although she had not been heard of at Liverpool, she might have arrived at Miremachi. In all these cases, it was usual to bring witnesses from the outward port; and although this might be dispensed with where the voyage insured was out and home, it was

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peculiarly necessary here, where, for any thing that appeared, it was not the intention of this ship ever to return to Europe. The plaintiffs had not offered the best evidence which the nature of the case admitted of, and they had not laid the proper groundwork for the presumption that the ship had perished.

Sir JAMES MANSFIELD, C. J. held, that this was evidence to go to the jury of a loss, as laid in the declaration; and the plaintiffs had a verdict.

Vaughan, *Pell*, Serjeants, and *Barrow*, for the plaintiffs.

Shepherd and *Best*, Serjeants, for the defendant.

Vide Cohen v. Hinckley, *ante*, 51.

HOME CIRCUIT.

LENT ASSIZES, 49 GEORGE III.

HORSHAM.

CORAM M'DONALD, C. B. 1809.

SALTER *v.* TURNER Clerk. Monday, March 20.

THIS was an action for a libel upon the plaintiff in the management of a public charity.

The declaration stated, that Sir Edward Law, Knt. his Majesty's attorney general, filed an information in the court of Chancery against one Thomas *Eamy;* and "that afterwards, and before the publishing, &c. to wit, on &c., the answer of the said Thomas *Eamy* to the said information was filed in his Majesty's said court of Chancery."

To support an allegation, that to an information in chancery against *T. Eamy*, "the answer of the said *T. Eamy* was filed," it is enough to put in an office copy of an answer to the information, entitled "the answer of *T. Eamy*," although this be signed *T. Amey*.

In support of the last allegation there was produced an office copy of an answer to the information, entitled, "The several answer of Thomas *Eamy*," but signed "Thomas *Amey*."

Shepherd, Serjeant, contended, that the allegation was not proved, as there was no evidence that

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Thomas *Eamy* and Thomas *Amey* were the same person. If the original answer had been produced, and the hand-writing proved to be that of a person known by the name of *Eamy*, it might have been enough; but there was no ground laid for the presumption, that the person who signed the answer was the person against whom the information had been filed. It stood as if the two names had been totally dissimilar; in which case no one could have argued, that this must be taken to be the answer of Thomas *Eamy*. The declaration would have done enough in stating, that an answer "*entitled* the several answer of Thomas Eamy" was filed; but the averment actually introduced, rendered evidence indispensable of this being "*the answer of the said Thomas Eamy.*"

Garrow answered, that the signature was immaterial, and that if this person had made his *mark* to the answer, it nevertheless would have been the answer, not of ✕, but of *Thomas Eamy*.

M'DONALD, C. B. The person who signs his name *Thomas Amey*, by answering the bill, allows that he is the person against whom it is filed; and this is further proved by the jurat. I therefore think that the office copy is sufficient, without the production of the original answer and proof of the hand-writing.

The plaintiff had a verdict.

Garrow and *Marryat* for the plaintiff.

Shepherd, Serjeant, for the defendant.

REX *v.* CRUNDEN.

Tuesday, March 21.

THIS was an indictment against the defendant for indecently exposing his naked person in the presence of divers of his Majesty's liege subjects, at Brighton, in the county of Sussex.

It is an indictable offence for a man to undress himself on the beach and to bathe in the sea, near inhabited houses, from which he may be distinctly seen; although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question.

It appeared, that on a Sunday forenoon, in July last, he bathed in the sea opposite the East Cliff at Brighton, undressing and dressing himself upon the beach. Till within a very few years there were no houses near this spot, and whole regiments of soldiers used to bathe there at the same time. There is now a row of houses erected on the cliff, from the windows of which the defendant might be distinctly seen as he undressed and swam in the sea. There was no evidence of his having been guilty of any wanton indecency, or having exposed his person beyond what was necessary for the purpose of bathing.

Marryat, as his counsel, contended, that however censurable he might be, for a breach of delicacy and good manners, he had not been guilty of an indictable offence. His object was to procure health, and enjoy a favourite recreation, not to outrage decency or corrupt the public morals. He had no criminal intention, without which there can be no crime. Besides, it appeared that the practice of bathing

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bathing at this place had continued for many years; and if it was a nuisance, the inhabitants of the newly-erected houses *had come to the nuisance*, and had no right to complain of it. If the building of a house within sight of a spot appropriated to open bathing, rendered it a misdemeanor to bathe there any longer without a machine, the poor might soon be prevented from bathing on any part of the southern coast of the island. According to the principal contended for, all bathing must likewise be put a stop to in the Thames, and every other navigable river; for they are all public highways on which his Majesty's liege subjects are constantly passing and repassing; and Millbank, at which the Westminster boys have time immemorial been accustomed to bathe, is fully as much exposed to public view as the East Cliff at Brighton.

M'DONALD, C. B. I can entertain no doubt that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For any thing that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague house; but it will scarcely be said by the learned counsel for the defendant, that any one might now do so with impunity in Russell Square. Whatever place

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place becomes the habitation of civilized men, there the laws of decency must be enforced.

The defendant was found guilty; and when he was brought up for judgment, the Court of K. B. expressed a clear opinion, that the offence imputed to him was a misdemeanour, and that he had been properly convicted. However, as this was the first prosecution of the sort in modern times, they consented to his being discharged, upon his entering into a recognizance to appear when called for to receive sentence.

Shepherd, Serjeant, and *Gurney* for the prosecution.

Marryatt for the defendant.

The only case resembling this to be found in the books is *Rex* v. *Sir Charles Sedley*, M. T. 15 Car. 2. Sid. 168. 1 Keb. 620, S. C. The defendant being indicted for shewing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment, and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.—It seems an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanour at common law. 4 Bl. Com. 65. 1 Hawk. P. C. c. 5. s. 4. 1 East P. C. c. 1. s. 1.

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KINGSTON.

CORAM HEATH, J.

Thursday, March 23.

HART *v.* HORN.

In replevin, the declarations of the person under whom the defendant makes cognizance, are not evidence for the plaintiff.

REPLEVIN. Cognizance, as bailiff to one *Massey*, for rent in arrear. Plea in bar, *non tenuit*.

The plaintiff's counsel, to disprove the tenancy, wished to give in evidence a declaration of *Massey*, the supposed landlord. They contended, that although not a party on the record, he was in reality the defendant in the action, and that the court would not force the plaintiff to call a witness who had such a direct interest to suppress the truth. In fact, what *Massey* had said voluntarily before action brought, must be considered better evidence than what he would now swear to with such a bias on his mind.

Garrow urged that Massey was clearly a good witness for the plaintiff, and that he must therefore be called.

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HEATH, J. was of opinion, that what *Massey* said was not evidence against the defendant.

The plaintiff had a verdict.

Shepherd and *Best*, Serjeants, and *H. Shepherd* for the plaintiff.

Garrow for the defendant.

[Attornies, *Isacks* and *Spike*.]

But a rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper; and since he cannot be compelled to be a witness, his declarations are evidence for the adverse parish. Rex v. Woburn, 10 East 395. Great confusion, however, would be introduced into proceedings at law, if it were to be inferred as a corollary from this decision, that where an action is brought by or against a trustee, the declarations of the *cestui que trust* shall be evidence for the opposite party.—The declarations of the trustee being admissible, it seems to follow that the *cestui que trust* must be called as a witness. Bauerman v. Radenius, 7 T. R. 663.

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Thursday, March 23.

WETHERSTON *v.* EDGINGTON.

Where an agreement not under seal is produced at the trial by one of the parties in pursuance of an undertaking to produce it, the opposite party, to make it evidence, must prove it in the same manner as if it had come from his own custody.

THE pleadings in this case were similar to those in the last.

The *holding* was to be proved by an agreement not under seal, which the plaintiff's attorney had undertaken to produce, and did produce accordingly.

Best, for the defendant contended, that under these circumstances the agreement did not require to be proved. He allowed that according to a late decision (*a*) it would have been otherwise, had this been a deed; but observed that a distinction had been taken by Sir JAMES MANSFIELD, between a deed and an instrument not under seal.

HEATH, J. The old rule was the sensible one, that an instrument coming from the opposite side was *primâ facie* taken to be duly executed (*b*); but I can discover no difference as to this prpose between a deed and an agreement not under seal. You must prove this agreement as if it had been in your own custody.

(*a*) Gordon *v.* Secretan, 8 East 548.

(*b*) Rex *v.* Middlezoy, 2 T.R. 41.

The

The agreement was afterwards proved by the attesting witness, and the defendant had a verdict.

Garrow and *Lawes* for the plaintiff.

Best, Serjeant, and *Espinasse* for the defendant.

[Attornies, *Orchard* and *Broad*.]

Q. Might not the chief objection to the rule now established upon this subject, that the party who calls for the instrument from the opposite side is ignorant of the name of the attesting witness, and therefore cannot come prepared to prove it, be completely obviated by obtaining a rule of court or a judge's order to inspect the instrument before the trial? Vide Cooke v. Stocks, M. 36 G. 3. cited 1 Tid. Prac. 481. 4th ed.

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MAIDSTONE.

CORAM M'DONALD, C. B.

Wednesday, March 29.

ROE ex d. DEAN AND CHAPTER OF ROCHESTER *v.* PIERCE.

In an ejectment by a corporation against a tenant from year to year, a notice to quit given by a person acting as steward of the corporation, is sufficient, without evidence that he had an authority under seal from the corporation for this purpose.

THIS was an ejectment to recover possession of the same cottage for the use and occupation of which the action was brought in *Dean and Chapter of Rochester v. Pierce*, ante Vol. I. 466.

It appeared that the defendant had occupied the cottage in question a great many years without any lease, and that *Mr. Twopenny*, steward to the Dean and Chapter, in the time of Dr. Goodenough, predecessor to the present Dean, gave him a verbal notice to quit, which expired some time before the day of the demise.

Lawes for the defendant, objected to the regularity of the notice to quit, for which there appeared to be no sufficient authority. The landlords being a corporation,

a corporation, it was requisite either to prove a notice to quit under the corporation seal, or to shew that *Mr. Twopenny*, who gave the notice, had a power of attorney under the same seal for so doing.

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M'DONALD, C. B. A verbal notice to quit given by the steward of the Dean and Chapter, is sufficient, without any other evidence of his authority. The Dean and Chapter by bringing the ejectment shew, that they authorized, and that they adopt, his act.

The lessors of the plaintiff obtained a verdict.

Best, Serjeant, and *Marryat*, for the lessors of the plaintiff.

Lawes for the defendant.

[Attornies, *Twopenny* and *Lockwood*.]

BARTON v. HANSON and others.

Thursday, March 30.

ACTION for goods sold and delivered. Plea, the general issue.

There is an agreement between A., B. and C., the proprietors of a stage coach, who divide the general profits of the concern; and maintained that they shall each work the coach a stage with horses, their separate property, respectively at their separate expence.—B. and C. are jointly liable as co-parmers with A. for the price of hay furnished at A.'s request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him under the agreement.

The defendants are proprietors of a stage-coach which has run for some years between London and

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Hastings. The horses which worked the stage between Hurst Green and Tunbridge were put up in a stable at Lamberhurst. At this stable, to a man who took charge of the coach horses, the plaintiff, at the request of the defendant *Hanson*, delivered a quantity of hay and straw, which was used by these horses, and for the price of which the present action was brought. It appeared that Hanson had lately become insolvent.

The defence rested upon the following facts,—that although the defendants were joint proprietors of this stage coach, and shared the general profits of the concern; yet that each of them worked the coach a stage with horses which were his separate property, and which he was bound to maintain at his own separate expence; that the horses which occupied this stable, and drew the coach between Hurst Green and Tunbridge, were the sole property of Hanson; and that as he alone had ordered the hay and straw of the plaintiff, so the plaintiff had applied to him for payment, and had said that if *he* did not pay him, he must lose his money.—It was thence argued that the maintaining of these horses did not come within the scope of the partnership; that the credit was given singly to Hanson, and that the other defendants were not liable.

M'DONALD, C. B. This defence has as little foundation in law as in common honesty. The defendants are partners; and by what any one of them does respecting the partnership concerns, all the rest are bound. All the defendants enjoyed the benefit of the articles furnished by the plaintiff, and

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and all are liable for the value of them. It is possible that a separate credit may be given to one of several partners; but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence. There is no such evidence in this case. If I deal with two partners, one of whom resides in London and the other in Cumberland, I apply for payment of my debt in the first instance, to the one who is at hand; but I do not thereby renounce my claim upon the other at a distance. The plaintiff demanded payment of Hanson; but, did he say to the rest of the defendants, "I will never look to you, for I gave you no credit?" This is a common action for goods sold to a partnership.

Verdict for the plaintiff.

Marryat and *Lawes* for the plaintiff.

Best, Serjeant, *Gurney* and *D'Oyley*, for the defendant.

[Attornies, *Pope* and *Martin*.]

If one of several partners promise individually to pay a debt, he will not be allowed to shew that it was due jointly from himself and his co-partners.

Murray v. Somerville. Sittings after H. T. 1809.—Money had and received. Plea in abatement, that the promise was made jointly with one Stuart and one Montgomery, who are both alive. Defendant proved that he had two partners of these names in America; but several letters from him to the plaintiff were put in, which were signed in his own name, and in which he promised to pay the money in question, without making any mention of his partners. Lord ELLENBOROUGH held the letters conclusive evidence that the debt was due from the defendant individually, and not from the partnership; and the plaintiff had a verdict for the amount of his demand.

Vide Dry v. Boswell, ante Vol. I. p. 329.

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Friday, March 31.

REX *v.* MARTIN.

An Act of Parliament for regulating the concerns of the poor in a particular parish, requires that certain notice shall be given of a vestry for the election of a treasurer, and that a treasurer shall be elected at a vestry held in pursuance of such notice.—To support an allegation in an indictment that "A. was *duly* elected treasurer of the said parish," an entry in the vestry book, stating that A. was elected treasurer *at a vestry duly held in pursuance of notice*, is sufficient evidence.

THIS was an indictment against the defendant, a silversmith at Greenwich, for a libel on one Richard Best in his office of treasurer of that parish.

The indictment averred, that the said Richard Best was duly appointed treasurer of the said parish. —The management of the concerns of the poor in Greenwich is regulated by a local act of parliament, which provides that notice shall be given in a certain manner therein specified, of a vestry to be held on a certain day for the election of a treasurer, and that a treasurer shall be annually elected at a vestry so held in pursuance of such notice.

To prove the appointment of Mr. Best, there was offered in evidence an entry in the vestry book, in which it is stated, that at *a vestry duly held in pursuance of notice*, this gentleman was appointed treasurer of the parish for the year ensuing.

Best, Serjeant, for the defendant, contended, that although it might have been enough if the indictment had stated that the prosecutor acted as treasurer when the supposed libel was published, it was essentially necessary to prove the allegation that he was *duly appointed*. But his appointment would be a nullity, unless the notice required by the act of

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of parliament was given of the holding of the vestry at which he was elected. Evidence of that notice must therefore be given, or it did not appear whether he rightfully executed the office, or whether he had usurped it.

M'DONALD, C. B. Strict evidence of the appointment does seem requisite, and to the validity of the appointment due notice of holding the vestry is essential. But, I conceive that this is fully proved by the recital in the vestry book. What is thus recorded before the inhabitants of the parish, I must consider as having their assent, and as being evidence in any case of this description. The books of the Bank of England, and of other public companies, are evidence to a great variety of purposes (*a*). I think the allegation is sufficiently substantiated.

The defendant was found guilty.

Garrow, *Marryat* and *Gurney* for the prosecution.

Best, Serjeant, *Alley* and *Bolland*, for the defendant.

[Attornies, *Martyr* and *Parrell*.]

(*a*) Bretton v. Cope, Peak. Cas. 30.

So *corporation books*, concerning the public government of a city or town, when they have been publicly kept, and the entries have been made by a proper officer, are received as evidence of the facts contained in them. Rex v. Motherfall, 1 Stra. 93. Case of Thetford, 12 Vin. Abr. 90. pl. 16.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Easter Term,
49 GEORGE III.

SECOND SITTINGS IN TERM AT WESTMINSTER. 1809.

MOLLETT *v.* BRAYNE.

ASSUMPSIT for use and occupation. Plea, tender as to part, and non assumpsit as to the residue.

A tenancy from year to year created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly.

It appeared that the defendant took the premises in question of the plaintiff, at Lady-day, 1808, at the yearly rent of £. 42. In the November following, disputes arose between the parties as to the doing of some repairs. The defendant then threatening to quit the premises, the plaintiff said, "You may quit when you please." The defendant accordingly left the premises a few days after, and tendered the plaintiff rent for a day beyond the time he had occupied them. This sum was paid into court upon the tender pleaded; and the

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question now was, whether the plaintiff was entitled to rent after the defendant had quitted.

Lord ELLENBOROUGH was of opinion that the tenancy was not determined merely by the landlord giving the tenant a parol licence to quit, and the tenant quitting accordingly. At that time there was a subsisting term in the premises, and the *statute of frauds* (29 Car. 2. c. 3. § 3.) provides, that no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered, unless by deed or note in writing, or by act and operation of law. Here, there was no deed or note in writing, and nothing was proved which can be considered a surrender by operation of law.

The plaintiff had a verdict for the rent down to Lady-day 1809; and the court of K. B. upon a motion for a new trial approved of the direction at Nisi Prius, and refused a rule to shew cause.

Park and ——— for the plaintiff.

Garrow and *F. Pollock* for the defendant.

So the mere cancelling of a lease is not a surrender of the term thereby granted, within the statute of frauds. Roe v. Abp. of York, 6 East, 86. Nor can a term from year to year created by parol, be assigned except by deed, or note in writing, or by operation of law. Botting v. Martin, *ante*, Vol. 1. p. 318.

LAST SITTINGS IN TERM AT GUILDHALL. 1809.

CORAM BAYLEY, J.

TAYLOR *v.* JONES.

Saturday, May 13.

ACTION against the defendant, as indorser of a promissory note, due May 5th, 1805.

In an action against the indorser of a promissory note or bill of exchange, it is sufficient evidence of presentment for payment and notice of dishonour, that the defendant promised absolutely to pay the note or bill after it was due.

The plaintiff proved the defendant's indorsement, and also that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its nonpayment being given to the defendant; nor did it appear, that when the defendant so promised to pay, he knew whether any application for payment had been made to the maker.

Gaselee for the defendant contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder. In the cases hitherto decided upon this subject, something appeared that might be considered a waiver of any irregularity

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irregularity with regard to the bill or note(*a*); which could not be inferred from a mere promise to pay, made at a time when the party, without being aware of it, was discharged from his liability.—But

BAYLEY, J. held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due to the acceptor or maker, and to receive notice of its dishonour, promises to pay it,—this is presumptive evidence of the presentment and notice, and he is bound by the promise so made.

Verdict for the plaintiff.

Paley for the plaintiff.

Gaselee for the defendant.

[Attornies, *Birkitt* and *Egerton*.]

(*a*) *Vide* Lundie v. Robertson, 7 East 231.

But if the drawer or indorser after being arrested, without acknowledging his liability, merely offers to give a bill, by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice. *Cumming* v. *French*. *Westminster Sittings after Hilary Term*, 1809. Action on a bill of exchange drawn by the defendant, payable to his own order, and indorsed by him to one Woodroff, and by Woodroff to the plaintiff.

The plaintiff was not prepared to shew directly, that notice had been given to the defendant of the dishonour of the bill, but undertook to give evidence, from which

which it must either be inferred, that he had received such notice, or that he was not entitled to it, or that he waived the irregularity.

The clerk to the plaintiff's attorney accordingly swore, that having called upon the defendant after his arrest in this action, he asked him, "what he had to propose by way of settlement?" and that the defendant then said, "*I am willing to give my bill at one or two months;*" but that this offer was rejected.

Lord ELLENBOROUGH. This offer is neither an acknowledgment, nor a waiver, to obviate the necessity of expressly proving notice of the dishonour of the bill. He might have offered to give his acceptance at one or two months, although being entitled to notice of the dishonour of the former bill, he had received none, and although, upon this compromise being refused, he meant to rely upon the objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made.

Plaintiff nonsuited.

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FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Tuesday, May 16.

COBDEN *v.* BOLTON.

A carrier places a board in his office, giving notice that he will not be answerable for *jewels, however small their value*, unless entered as such; but circulates hand-bills, stating generally, that he will not be answerable for any article *above the value of 5 l.*, unless entered as such.—He is answerable for the loss of *jewels* not entered as such, if *under* the value of 5 *l.*

THIS was an action against the defendant for the loss of a broach and a ring, value £. 1. 12., sent by the Chichester coach, of which he is proprietor.

It was clearly proved that the articles in question had been delivered, properly packed up, at the defendant's coach-office at Charing Cross, and that they had never reached the person to whom they were addressed at Chichester.

The defendant's liability, however, was denied on account of a notice written in large letters on a board (*a*) in his office, whereby it is stated (among other things), that he would not be answerable for plate or jewels, *however small the value*, unless entered and paid for as such. To meet this evidence it was proved, on the part of the plaintiff, that the defendant had circulated a great number of printed hand-bills, containing a list of the various coaches he runs to different parts of

(*a*) A question arose, how the contents of this board, which was inlaid in the wall, should be given in evidence. Lord Ellenborough held that an *examined copy* should be produced, with which the defendant was prepared.

England,

England, and concluding with a memorandum, "that he would not be answerable for any article above the value of £. 5, unless entered as such and paid for accordingly," without any specific notice being taken of plate or jewels. It was contended for the defendant, that the notice on the board, which must be seen and read by every one when articles are delivered at the office, and the contract must be supposed to be entered into between the parties, ought to be considered as containing the terms of that contract.—But

Lord ELLENBOROUGH said, the printed papers in circulation dispensed with any necessity to attend to the notice in the office. Why should a person read the board when previously informed by the hand-bill of the terms on which the defendant carried on his business? I have a right to presume, that what is circulated by his authority contains the whole of the limitations he intends to put on his common law responsibility as a carrier, and gives a full statement of the special contract into which he enters with his customers. The property here being under the value of £. 5, the *loss* is the only point for the jury.

Verdict for the plaintiff. Damages £. 1. 12.

Garrow and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Steventon* and *Bovill.*]

Vide Nicholson v. Willan, 5 East, 507. Clarke v. Gray, 6 East, 464.

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Tuesday, May 16.

PHILIPSON, Gent. one, &c. *v.* CHASE.

In an action on an attorney's bill, the plaintiff cannot give parol evidence of the contents of the bill delivered, without a notice to produce it: but a copy made at the same time with the bill delivered, is good evidence, without such notice.

ACTION on an attorney's bill. Plea, the general issue.

To prove that a copy of the bill had been delivered pursuant to 2 Geo. II. c. 23. the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's book, when the defendant's counsel objected that no notice had been given to produce it.

Topping and *Espinasse* for the plaintiff, insisted, that this was unnecessary. In Jory *v.* Orchard, 2 Bos. & Pul. 39, the court of C. P. held, that it was unnecessary to give a notice to produce the written demand of a copy of a warrant pursuant to 24 Geo. 2. c. 44, before giving evidence of its contents; and the very point before the court was decided in Anderson *v.* May, 2 Bos. & Pul. 237, where it was held that a copy of an attorney's bill, the original of which has been delivered to the defendant, may be admitted in evidence without proof of notice to produce the original. This had always been considered like the case of a notice to quit, in which no notice to produce was ever required.

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Lord ELLENBOROUGH. If there are two co-temporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered. So it must have been in the cases which have been cited; and if a duplicate of the bill delivered is offered, I am ready to receive it. But I am quite clear that this evidence from the plaintiff's books is inadmissible, to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit; and I remember when the point was first ruled by Mr. Justice Wilson, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required *in infinitum*.

Plaintiff nonsuited.

Topping and *Espinasse* for the plaintiff.

Garrow for the defendant.

[Attornies, *Phillipson* and *Williams*.]

FIRST SITTINGS AFTER TERM IN LONDON.

Wednesday, May 17.

BURROUGH *v.* MARTIN.

A witness, for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined, from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection.

IN an action on a charter party, a witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he had written it himself, he said, that he had not, but that from time to time he examined the entries in it while the events recorded were fresh in his recollection, and that he always found the entries accurate.

The Attorney General contended, that the witness could make no use of the log-book during his examination, notwithstanding his former inspection of it, and that the only case where a witness could refer to a written paper for the purpose of giving evidence, was where he had actually written it himself, and had thus the surest means of knowing the truth of its contents.

Lord ELLENBOROUGH. If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent, and fresh in his recollection, it is as good as if he had written the whole with his own hand. This collation gave him an ample opportunity to ascertain the correctness of

of the entries, and he may therefore refer to these, on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written.

The witness was then asked, under his lordship's sanction, 1st. Whether he saw an entry of 23d June 1808, at a time when he had a memory of the fact stated in it? and 2dly, Whether, looking at the entry, he could now state positively, upon his oath, when the ship arrived at her port of destination?

Garrow, *Park*, and *Abbott* for the plaintiff.

The Attorney General and *Marryat* for the defendant.

[Attornies, *Rawlinson* and *Crowder & Co.*]

Vide Doe v. Perkins, 3 T. R. 749. Tanner v. Taylor, ib. 754. Jacob v. Lindsay, 1 East 460.

HOPEWELL *v.* DE PINNA.

Tuesday, May 16.

ACTION on promissory note, dated 28 July 1808. —Plea, coverture.

Under a plea of coverture, where it appeared that the defendant's husband went abroad 12 years ago; *held*, that she was bound to prove that he was alive within 7 years.

The defendant proved, that in the year 1779 she was married in London, according to the rites of the Jewish religion, to David Serfity de Pinna, and that this person went to Jamaica about 12 years ago.

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HOPEWELL v. DE PINNA.

ago. The question was, as to the degree of evidence required to prove that he was still alive.

It was insisted for the plaintiff, that in support of this plea, the defendant was bound to give strict evidence, that her husband was alive at the commencement of the action, or at least at the date of the note; while it was contended, on the part of the defendant, that the presumption was in favour of any person being still living who was shewn to have been in existence within such a period as twelve years, and that in many cases of this sort, where the husband was gone to a distant part of the world, it would be quite impossible to adduce direct and positive proof of his being alive, although the fact could not reasonably be doubted.

Lord ELLENBOROUGH ruled, that it lay upon the defendant to prove that her husband was alive within seven years.

Letters were afterwards produced, which he had written within that period from Jamaica to his friends in England, and the defendant had a verdict.

Lawes for the plaintiff.

Reader for the defendant.

[Attornies, *Turner* and *Isaacs*.]

Vide Stat. 1 Jac. 1. c. 11. § 2.

FIRST SITTINGS AFTER TERM IN LONDON. 1809.

MESSING *v.* KEMBLE. Wednesday, May 17.

DECLARATION in trespass, in the common form, for breaking and entering the plaintiff's house, and seizing his goods.—Plea, not guilty.

Trespass will not lie for an irregular distress, where the irregularity complained of, is not in itself an act of trespass, but consists merely in the omission of some of the forms required in conducting the distress,—such as procuring goods to be appraised before they are sold. The true construction of the provision in 11 G. 2. c. 19. § 19, that the party may recover a compensation for the special damage he sustains by an irregular distress "*in an action of trespass or on the case*," is, that he must bring *trespass*, if the irregularity be in the nature of an act of trespass, and *case*, if it be in itself the subject matter of an action on the case.

It appeared that the plaintiff held the house mentioned in the declaration under the defendant, and that the goods in question were seized as a distress for rent in arrear, but that they were sold without having been previously appraised pursuant to the statute 2 W. & M. c. 5.

Marryat for the plaintiff, contended that under these circumstances he was entitled to a verdict; for though it was enacted by 11 Geo. 2. c. 19. § 19. that a distress for rent justly due, should not by reason of any irregularity in the mode of conducting it, be deemed unlawful, nor the party making it a trespasser *ab initio*, yet it was provided that the party aggrieved by such irregularity, "may recover full satisfaction for the special damage he shall have sustained thereby in *an action of trespass*, or on the case, at the election of the plaintiff." Therefore in this action of trespass which the plaintiff

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had elected to bring, he was entitled to recover for the damage he had sustained from the goods being sold without a regular appraisement, and thus being disposed of under their just value.

Lord ELLENBOROUGH. The statute provides, that the party aggrieved by the irregularity of the distress, shall recover satisfaction for the special damage he has sustained; but it provides, that the distrainor shall not, by reason of any irregularity, be deemed a trespasser for such part of the conduct of the distress as is perfectly regular. It does not say that he shall be a trespasser for the irregularity, whether that consist in an act or omission, in nonfeazance or in malfeazance. The statute does not attempt to confound legal distinctions; but allows the injury done to the tenant to be a trespass or tort according to the nature of the irregularity, and gives the remedy of trespass or case according to the cause of action. Here, the distress was conducted with perfect regularity, except that the defendant omitted to have the goods appraised before they were sold. This omission was not a trespass, and the action is misconceived. The provisions and the object of 11 Geo. 2. would be entirely defeated, if this mode of proceeding were permitted. The legislature intended that the landlord should be specifically informed of the irregularity of which the tenant complains; but when the declaration states that the defendant with force and arms broke, and entered the plaintiff's house, how can he know that the real complaint against him is, that he sold the goods before they were appraised? Even

Even in trespass for an irregular distress, it might be well if the plaintiff were to declare specially, and take up the grievance where his cause of action commences. But I am quite clear, that the present action cannot be maintained.

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Plaintiff nonsuited.

Marryat for the plaintiff.

Park and *Espinasse* for the defendant.

[Attornies, *Davies* and *Good*.]

In Winterbourne v. Morgan, T. T. 49 G. 3. in which the Court held, that for remaining in possession of the goods in the plaintiff's house beyond the five days, he may declare in trespass generally, for breaking and entering his house and seizing his goods, it was agreed that for such an irregularity as omitting the appraisement, trespass would not lie, and that the plaintiff must elect to bring trespass or case according to the nature of his injury.

GYFFORD v. WOODGATE and another. Thursday, May 18.

CASE. The declaration after setting forth a judgment obtained by the defendants against the plaintiff, stated that they sued out a writ of *fieri facias* thereupon, indorsed to levy £. 71. 1 *s.* besides sheriff's poundage, &c.; by virtue whereof the sheriff at the defendants' request seized the plaintiff's goods to a much greater amount than was necessary; yet that the defendants before the sheriff had

In an action by A. against B. for suing out a second writ of *fieri facias* before the sheriff had made any return to the first, the sheriff's returns to the first and second writs, stating that the execution was so conducted at A.'s request and with his consent, are *prima facie* evidence for B. against A. to support a plea of licence.

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made any return to the said writ, and before they could lawfully sue out another writ of execution on the said judgment, wrongfully and maliciously sued out an *alias fieri facias*, under colour and pretence thereof, indorsed to levy £. 72. 2*s*. 4*d*. besides poundage, &c.; whereby the plaintiff was put to unnecessary expence, and was greatly harrassed and oppressed &c.—In addition to the general issue, the defendants pleaded *a licence;* which was denied by the plaintiff in his replication.

The writ of *fieri facias* being given in evidence on the part of the plaintiff, the following return annexed to it was required to be read by the defendant's counsel as part of the instrument given in evidence by the plaintiff, and though resisted by the plaintiff's counsel, was directed to be read by his Lordship. It run thus: "By virtue of the writ annexed, I have seized and taken in execution the goods and chattels of the within named Edward Gyfford in my bailiwick hereafter mentioned, to be sold and disposed of, and at the request of the within named Edward Woodgate the elder, and Edward Woodgate the younger, the plaintiffs, and Edward Gyfford, the defendant, I kept and retained the same in my custody until the return of the annexed writ; and at the return thereof, in pursuance of an agreement made between the said plaintiffs and the defendant for that purpose, a writ of *alias fieri facias* returnable, &c. indorsed to levy £. 72 2*s*. 4*d*. besides sheriff's poundage, &c. was delivered to me the said sheriff; and at the request of the within named Edward Gyfford, I forbore to sell

sell the same until the 26th of August last, when I sold and disposed of the same for the sum of £.110 17*s.*, and paid and applied the same as stated and set forth in my return to the writ of *alias fieri facias*.

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To the *alias fieri facias* (also given in evidence) the sheriff made a very special return, stating, that he had paid to the now defendants the sum indorsed on the writ; that he had disposed of other part of the money for which the goods sold, in payment of rent and taxes, for which the now plaintiff was liable; and that he had always been ready to pay to the latter the residue thereof, if he would accept the same.

Park, for the defendants, contended, that these returns were conclusive evidence in support of the plea of licence, and shewed that whatever irregularity might have occurred in the execution, had been sanctioned by the plaintiff himself.

Garrow, *contra*, denied that the plaintiff, who was no party to them, could be affected by any thing which they contained. The process of execution in this instance had been clearly sued out and acted upon contrary to the practice of the court, and the rules of law, and it lay with the defendants to shew the plaintiff's licence and consent, from what he himself had said or done.

Lord ELLENBOROUGH. I am of opinion, that it is incumbent on the plaintiff to contradict the facts stated in these returns. Faith is given to what

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the sheriff states in this manner, even where third persons are concerned. If he returns a rescue, an attachment issues in the first instance (*a*). I consider this, however, as only *primâ facie* evidence. Upon an indictment for a rescue, it would be open for the defendant to shew that the return was false (*b*). Here you are at liberty to contradict any of the facts stated in the returns to these writs; but if you do not, I must presume that there was an agreement of the nature stated between the parties, and that the plaintiff has no cause of action.

Plaintiff nonsuited.

In the ensuing term a new trial was moved for, on the ground that the returns to the writs were no evidence against the plaintiff, being made on the suggestion of the defendants; but the court refused a rule to shew cause, saying, that if the plaintiff had not given his consent in the manner stated, his remedy was by an action for a false return against the sheriff.

Garrow, *Gurney*, and *Curwood* for the plaintiff.

Park for the defendant.

[Attornies, *Duff* and *Ludkin*.]

(*a*) Rex v. Elkins, 4 Burr. 2129. 2 Salk. 586. Cas. *temp.* Hardw. 112.

(*b*) 2 Hawk. P. C. c. 21. s. 4.

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If a copy of any document which itself is not evidence at common law, be made evidence by act of parliament, a copy must be produced, and the original is not made admissible evidence by implication.

Burdon v. *Rickets*, sittings after E. T. 1809.

—Replevin.— Avowry, stating that the avowant had purchased the land tax assessed upon the *locus in quo*, and that he distrained for six years arrears which were due. Plea in bar, denying the purchase.

To prove this, the avowant offered in evidence the original contract between him and the commissioners for the redemption of the land-tax.

By 42 G. 3. c. 116. s. 165. it is enacted, that a *copy* of the contract with the commissioners shall be legal evidence, and it was contended that if a copy was evidence, the original from which the copy was taken could not possibly be rejected.

But Lord ELLENBOROUGH refused to admit the original, saying, that upon the general principles of law it was not evidence for the purpose for which it was produced, and that the statute cited must be confined to copies of the contract, which alone it specified.

HODGKINSON v. MARSDEN.

Friday, May 19.

In debt on bond conditioned for the performance of covenants, if the condition is not set out in the pleadings, the plaintiff in executing a writ of inquiry under 8 & 9 W. 3. c. 11. must prove that the bond mentioned in the suggestion and produced to the jury, is that on which the action was brought.

THIS was a writ of inquiry to assess damages under 8 & 9 W. 3. c. 11. § 8. To a declaration in the common form in debt upon bond, the defendant demurred, and the plaintiff obtained judgment on demurrer. After the entry of judgment, the plaintiff suggested on the roll, that the bond mentioned in the declaration was subject to a condition for the payment of an annuity, and assigned as a breach that five quarters of this annuity were in arrear.

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Lawes for the plaintiff, at first satisfied himself with putting in a bond which appeared to have such a condition as that mentioned in the suggestion.

Peake, contra, insisted that it was requisite to go farther, and to prove that the bond produced was the same with that upon which the judgment was obtained; as there might be two bonds executed by the defendant on the same day, and in the same penal sum, with perfectly different conditions. If the plaintiff had set out the condition in the declaration, the case would have been quite different; but as the record stood, the defendant had had no opportunity of controverting the fact that the bond on which judgment was suffered was conditioned in the manner alleged. He could not plead to the suggestion; but the plaintiff was bound to prove the facts which were suggested.

Lord ELLENBOROUGH was of opinion, that the production of a bond with a condition according with the suggestion was insufficient, and that the plaintiff ought to prove that the bond produced was the same with that on which the action had been brought, of which profert had been made in the declaration, and on which the judgment had been obtained.

This evidence was given by the plaintiff's attorney, and a verdict passed for the arrears of the annuity.

Lawes for the plaintiff.

Peake for the defendant.

[Attornies, *Pearce* and *Settree*.]

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ROGERS v. KELLY.

Saturday, May 20.

A. pays a sum of money into a banker's for a specific purpose: the banker's clerk, by mistake, pays this money to *B.* who has no right to it. Held, that *A.* cannot maintain an action against *B.* to recover it back.

THIS was an action for money had and received, to recover the sum of 130*l.* under the following circumstances:

The plaintiff having indorsed a bill drawn by one I. C. for 130*l.* payable at Messrs. Austins & Co. and finding that it would not be honoured by the acceptor, paid in this sum of money to the bankers for the purpose of retiring it. The defendant held another bill of exchange for the same sum, accepted by the same person, due the same day, and payable at the same place. The latter bill being presented for payment first, and no funds being provided to pay it, the bankers' clerk, by mistake, gave the defendant the 130*l.* paid in by the plaintiff to satisfy the bill to which he had put his name.

Garrow for the plaintiff contended, that as the money had been paid in for a specific purpose, and as the very money paid in had been given by mistake to the defendant, it was to be considered as *ear-marked*, and might be followed by the person to whom it really belonged.

Lord ELLENBOROUGH. There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's

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plaintiff's money must still be considered as in the hands of the bankers. His account with them is the same as if this mistake had not been committed.

Plaintiff nonsuited.

Garrow and *Puller* for the plaintiff.

Park for the defendant.

[Attornies, *Kibblewhite* and *Richardson*.]

Vide *Anonymous*, 1 Salk. 289. Robson v. Eaton, 1 T. R. 62.

Saturday, May 20.

STEINMAN and others *v.* MAGNUS.

A man's creditors enter into an agreement with him not under seal, to take 20 l. per cent. upon their respective debts in satisfaction of the whole; —10 l. per cent. to be paid within a month, and the remaining 10 l. per cent. to be secured by the acceptances of a third person at 5 and 9 months. The composition is paid pursuant to the agreement.—A creditor who has signed the agreement and received the composition, cannot afterwards bring an action for the residue of his debt.

THIS was an action by the payees, against the drawer of two bills of exchange, dated 10th October 1804, the one for 400*l.* and the other for 376*l.* 4*s.* 1*d.* payable respectively at 6 months after date.

The defence was, that the plaintiffs along with the other creditors of the defendant, had signed an agreement not under seal, of which the following is a copy:

"We the undersigned being respectively creditors of Moses Magnus, of Great Somerset Street, Whitechapel, in the county of Middlesex, do

"hereby

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"hereby agree for ourselves respectively, to take "and accept 20*l.* per cent. in full payment and "satisfaction of our several and respective debts "due at the date hereof, and upon payment of the "said 20*l.* per cent. we hereby release and for ever "discharge the said Moses Magnus, his heirs, exe- "cutors, and administrators, and every of them for "ever, as to the remaining 80*l.* per cent.; and it is "hereby agreed to receive the said 20*l.* per cent. in "manner following; that is to say, 10*l.* per cent. "upon or within one month after the execution of "these presents, *5l. per cent. secured by the accept- "ance of Mr. Garland, of Bunhill Row, payable in "five months, and the remaining 5l. per cent. on the "like acceptance payable in nine months. Dated this "11th day of November* 1806."

Signed, &c.

The defendant's counsel offered to prove in addition to this, that the plaintiffs were paid the composition of 20*l.* per cent. pursuant to the terms of the agreement; that they were active in procuring other creditors to sign it; and that the defendant had been put to considerable expence in consequence of this agreement.

Park for the plaintiffs, insisted that these facts furnished no defence at law to the present action, and relied upon the authority of *Fitch v. Sutton*, 5 East 230, in which it was held, that the acceptance of a less, cannot be a satisfaction in law of a greater sum then due. If payment of a sum short of the debt did not operate as satisfaction, no more could a security for such a sum by whomsoever it might be given. Lord

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Lord ELLENBOROUGH was inclined to think, that this case was ruled by *Fitch v. Sutton*, and the plaintiff had a verdict.

But in Trinity Term following, the case was fully argued in shewing cause against a rule for setting aside the verdict, and granting a new trial. And the Judges were all clearly of opinion, that the facts offered to be proved on the part of the defendant, amounted to a good defence at law to the action. They thought that this case was distinguishable from *Fitch v. Sutton*, as it did not appear there that third persons were concerned; and that the fraud here practised upon the other parties to the agreement, brought the case within the principle of Cockshott *v.* Bennett, 2 T. R. 763. If it had not been for this agreement, it might have been impossible for the plaintiffs to recover so much as 20*l.* per cent, upon the amount of their debt, and the security they obtained from Garland was a valuable consideration for their releasing the residue. But it would be a fraud upon Garland, if the defendant could still be sued, in breach of the agreement, for the full amount of his debts.

Lord ELLENBOROUGH observed, that if the facts of the case had been particularly presented to his mind at the trial, he should certainly have held that upon their being proved the plaintiffs ought to have been nonsuited.

Rule absolute.

Park and *Marryat* for the plaintiffs.

Garrow and *Comyn* for the defendant.

[Attornies, *Wood* and *Jones*.]

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COWARD *v.* MABERLEY.

Wednesday, May 24.

DEBT on 5 Eliz. c. 4. § 31. for setting up and exercising the trade of a blacksmith, without having served an apprenticeship thereto of seven years.

A man is not liable to penalties under 5 Eliz. c. 4. as for exercising a trade without having served an apprenticeship to it, who merely exercises the trade incidentally as a branch of his general business. Therefore, a master coachmaker may lawfully keep journeymen blacksmiths in his employ to make the iron work of coaches, although he has not served an apprenticeship to the trade of a blacksmith. —So of a master carpenter and journeymen sawyers.

The witnesses stated, that the defendant is an eminent coachmaker in this town; that by workmen immediately employed by himself, he does all the various sorts of work required for the construction of coaches; that besides painters, carpenters, &c. he constantly keeps in his service ten or twelve journeymen blacksmiths; that those employed during the period mentioned in the declaration had served (although he had not) an apprenticeship of seven years to the business of a blacksmith; and that he did not exercise that business on any occasion by itself, but only incidentally, in as far as it was connected with coach-making.—There were no counsel for the defendant; but—

Lord ELLENBOROUGH said, he was quite clear this case was not within the statute, and that any man might lawfully carry on particular branches of a general business by such as had served an apprenticeship to those particular branches of the business in which they were employed.

Garrow and *Marryat* for the plaintiff, contended, that this section of the statute created two distinct

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tinct offences, viz. exercising any trade without having served an apprenticeship, and setting others to work who had not. If the defendant's journeymen smiths were of the description stated, he had not been guilty of the latter offence; but he certainly had committed the former, by himself exercising the trade of a master blacksmith. A man might carry on several trades at the same time; but by multiplied breaches of the statute he was not to save himself from its penalties.

Lord ELLENBOROUGH. The defendant has not been proved to have set up or to have exercised the trade of a blacksmith. Blacksmith's work may be required in building a bridge; but the builder who employs a journeyman properly qualified to do that work, is not himself to be considered as carrying on the trade of a blacksmith. The statute applies only to those who substantively set up and exercise a trade without having served an apprenticeship. The smith's work done by the defendant is only incidental to his general business of a coachmaker, and he might as well be prosecuted as a carpenter, a painter, or a wheelwright. I suppose he had been advised that the law being so clearly in his favour, it was not worth his while to waste his money in feeing counsel to defend him.

Verdict for the defendant.

Garrow afterwards stated, that the same doctrine had been laid down by Mr. Justice Lawrence in an action

action against a master carpenter for carrying on the business of a sawyer.

[Attornies, *Matthews* and *Seymour*.]

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Vide Reynard v. Chase, 1 Burr. 2.—Beach v. Turner, 4 Burr. 2449.—French v. Adams, 2 Wils. 168.—Beale v. Geale, *ante*, 1.

BLOGG and others, Assignees of HARRIS, a Bankrupt, *v.* PHILLIPS and another, late Sheriff of Middlesex.

Wednesday, May 24.

TROVER for jewellery.

If the goods of a trader are taken in execution after an act of bankruptcy, and the money arising from the sale paid over by the sheriff, two months before a commission is sued out, the bankruptcy will overreach the execution, notwithstanding 46 G. 3. c. 135. which protects all bonâ fide *payments* and *transactions* by or with the bankrupt more than two calendar months before the date of the commission.

The goods in question were taken in execution by the defendants on the 7th of July last, and it was proved that the bankrupt had committed an act of bankruptcy in the May preceding, but that the commission was not sued out against him till the 1st of October following. The goods were sold on the 20th July, and on the 30th of the same month, the money was paid over to the person at whose suit they were taken in execution.

Park for the defendants contended, that this case was within Sir S. Romilly's act, 46 Geo. 3. c. 135. § 1. whereby it is enacted, that "all *payments* by and to, and all contracts, and other dealings and *transactions*, by and with any bankrupt, *bonâ fide* made or entered into more than two calendar

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months before the date of the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed." Now this might be considered as a *payment* by the bankrupt of the sum recovered by the judgment, and at any rate, it was a *bonâ fide transaction* with the bankrupt.

Lord ELLENBOROUGH. There is no pretence for calling this a *payment by the bankrupt*, and the meaning of the word *transactions* must be determined by the words used along with it, viz. "contracts and other dealings." The transactions protected by this clause of the statute are evidently transactions between the parties in the ordinary course of business, not transactions carried on through the medium of legal process.

The plaintiffs had a verdict for the produce of the goods, making a deduction for the expences of the sale, but not for the sheriff's poundage.

Garrow and *Lawes* for the plaintiffs.

Park and *Marryat* for the defendants.

[Attornies, *Holloway* and *Smith*.]

But see 49 G. 3. c. cxxi. s. 2.

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Friday, May 26.

Rex v. Jones.

On the trial of an indictment for a fraud against an agent of government under the controul of the Treasury, a letter of instructions addressed to the defendant by the Lords of the Treasury, may be read in evidence, without proving the commission by which they were appointed.

THIS was an indictment against the defendant for frauds committed by him in his office of Commissary General in the West Indies. In the course of the trial some points arose worthy of being noticed.

The defendant in the warrant for his appointment under the King's sign manual, is directed to obey all orders issued to him by the Lords Commissioners of the Treasury. On the part of the Crown there was offered in evidence a letter addressed to him, containing certain instructions he was accused of disregarding: this letter, signed by Mr. Pitt and two more of the then Lords of the Treasury, he had received in the West Indies, and it was now produced by his solicitor under a notice to produce all letters, &c.

The defendant's counsel contended, that before this letter could be read in evidence, it was necessary to prove, that Mr. Pitt and the two others who signed it, were Lords Commissioners of the Treasury, and had authority to write it, by producing the commission by which they were appointed. But

Lord Ellenborough held, that this was unnecessary, and the letter was admitted on proof of the hand-writing of the three persons who had signed it as Lords Commissioners of the Treasury.

There is no objection of any sort to trying a man, upon one indictment, for several distinct misdemeanours of the same nature.

At one stage it was a material question, whether on the part of the Crown they could avail themselves

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selves of two counts of the indictment, so as to give evidence of part of the sums which the defendant had illegally obtained, under one count, and of the residue, under another.

The defendant's counsel urged that this could not be done, as it would be trying a man for two offences on the same indictment.

Lord ELLENBOROUGH.—In point of law, there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanours. It is the daily usage to receive evidence of several libels and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary general, though ranged under different counts as distinct and substantive misdemeanours. (*a*)

A person indicted for a misdemeanour or a felony, may be legally convicted upon the uncorroborated evidence of an accomplice.

The defendant's counsel afterwards contended that the case on the part of the crown rested entirely on the evidence of an accomplice; that this witness was not confirmed, and that therefore the defendant could not be legally convicted.

Lord ELLENBOROUGH. No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges

(*a*) *Vide* Rex v. Kingston, 8 East, 41.

in

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in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness. Within a few years, a case was referred to the 12 Judges, where four men were convicted of a burglary upon the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion, that the conviction as to all the four was legal, and upon that opinion they all suffered the sentence of the law. (*b*) Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them. In the case before the court, the witness alluded to cannot be considered an accomplice; and if he were, he is amply confirmed.

The defendant was found guilty.

The Attorney General, *Garrow*, *Abbott*, and *Richardson*, for the Crown.

Dallas, *Park*, *Topping*, and *Marryat*, for the defendant.

[Attornies, *Litchfield* and *Dennett* & *Co.*]

(*b*) Atwood's Case, 2 Leach, Cro. Cas. 521. Durham's Case, ib. 538. *acc.*

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Saturday, May 27.

REX *v.* LEEFE, Gent. one, &c.

If a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness; it is necessary, in support of this count, to prove, that in *substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury.

THIS was an indictment for perjury before a select committee of the House of Commons, appointed under the *Grenville Act*, to try the merits of a petition complaining of an undue election and return of members to serve in parliament for the borough of New Malton, in the county of York.

The counsel for the prosecution having failed upon the first count of the indictment, resorted to the second; and as a point of great nicety and importance arose upon this, it must necessarily be set out pretty much at length.

After stating that the select committee was duly appointed, and met to determine the merits of the petition, and that the defendant appeared as a witness, and was sworn before the committee, who had competent power to administer an oath to him in that behalf—the second count proceeded as follows: "And the said Edward Leefe being so sworn as aforesaid, it then and there became and was *a material question*, touching the merits of the said petition, whether the said Lord Headley [one of the members returned] before the close of the said election, had made any agreement to pay certain expences of the said Isaac Leatham, one of the candidates at the said election, including the expences incurred at different inns in the said borough where the friends of the said Isaac Leatham had dined, in consideration of the said Isaac Leatham

Leatham declining to be a candidate at the said election, and of the voters of the said Isaac Leatham then unpolled being applied to for the purpose of voting for the said Lord Headley at the said election; and also, whether the said Edward Leefe had communicated to certain persons, being the committee of the said Isaac Leatham at the said election, that the said Lord Headley had made such agreement; and also, whether the said committee of the said Isaac Leatham at the said election had dispersed to make known such agreement, and to carry the same into effect; and also, whether the said Edward Leefe had told the said Isaac Leatham that the said Lord Headley had given his assurance to the said Edward Leefe, that the said expences should be secured: Whereupon the said Edward Leefe not having the fear of God before his eyes, &c. on the said, &c. on his oath aforesaid, falsely, &c. did say, depose, swear, and give in evidence upon his oath aforesaid, to the said committee, touching the said material questions and the merits of the said petition, *in substance and effect* as follows; that is to say, that he the said Edward Leefe, by the directions of the said Isaac Leatham, waited upon the said Lord Headley at the King's Head in the borough of New Malton, on the second day of the said election, and before the close thereof, and proposed to the said Lord Headley, that the said Isaac Leatham would decline, upon the expences being paid him, including previous expences of the day before; and that the said Lord Headley then and there agreed that the said expences should be paid, including the expences that had been

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incurred at different inns in the town where the said Isaac Leatham's friends had dined; and that the said Isaac Leatham's voters (meaning such as were then unpolled) were to be applied to in consequence of that arrangement (meaning in consequence of the said Isaac Leatham's declining upon such expences being agreed to be paid to him as aforesaid), for the purpose of voting for the said Lord Headley; and that he the said Edward Leefe enumerated the expences, and told the said Lord Headley that the expences so to be paid, must include the expences of the different inns in the town of New Malton aforesaid; and that he the said Edward Leefe, upon his return to the committee of the said Isaac Leatham at the said election, communicated to them what had so passed between the said Lord Headley and him, (meaning that he the said Edward Leefe communicated to the said committee, that such agreement had been made as last aforesaid), and that the said committee of the said Isaac Leatham dispersed to make known the said agreement, and to carry it into effect; and that he the said Isaac Leatham asked the said Edward Leefe if the expences were secured; and that he the said Edward Leefe told the said Isaac Leatham that his Lordship, (meaning the said Lord Headley) had given his assurance *that it should be so:* Whereas, in truth and in fact, the said Lord Headley did not make any such agreement with the said Edward Leefe as aforesaid; and whereas, in truth and in fact, the said Edward Leefe did not enumerate the expences, nor tell the said Lord Headley that the expences so to be paid must include the expences of

of the different inns in the said town; and whereas, in truth and in fact, the said Edward Leefe did not communicate to the said committee of the said Isaac Leatham, that such agreement had been made as last aforesaid; and whereas, in truth and in fact, the said committee of the said Isaac Leatham did not disperse to make known any such agreement, or to carry any such agreement into effect; and whereas, in truth and in fact, the said Edward Leefe did not tell the said Isaac Leatham that his Lordship had given his assurance *that it should be so*, or that the said expences should be secured: And so, &c.

A short hand writer being called, stated the evidence which the defendant had given before the committee, and which agreed exactly with that set out in the second count of the indictment, except in the concluding sentence. The indictment states that to have been, "that his Lordship had given his assurance *that it should be so*." The short hand writer swore, that all he found upon his note in answer to the question upon this subject was, "that his Lordship had given his assurance."

The Attorney General for the defendant, insisted, that as these representations of the defendant's evidence before the committee, were in *substance and effect* materially different, the defendant was entitled to an acquittal.

Scarlett and *J. Williams*, of counsel for the prosecution, allowed that they could not proceed upon the last assignment of perjury; but contended, that the words as to the others were substantiated, and

as

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as these were upon questions material to the merits of the petition, the second count of the indictment was sustained, and the defendant ought to be found guilty. It was averred that the defendant deposed before the committee, "touching the *said material questions*, and the merits of the said petition *in substance and effect* as follows:" This must be taken to mean, that he deposed to each of these questions the answer connected with it. *Reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. Therefore, if he was proved to have falsely and corruptly sworn in substance and to the effect as set out in the indictment to any of these questions, it was quite sufficient. Otherwise, it would be nearly impossible to convict any man of perjury, and the more numerous the instances in which he perjured himself on any occasion, the greater would be his chance to escape.

Lord ELLENBOROUGH. Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know

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know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to shew, that under *secundum substantiam* you are not bound to prove the *substance* of what you state, as under *secundum tenorem*, you are bound to prove the *tenor*. To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record, should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts. There are facilities enough for convicting and punishing the guilty without infringing any of the rules of law. In the absence of authorities in support of the doctrine contended for, I will not originate one, and place this defendant in a state of peril in which no person charged with the same crime ever stood before. (*a*)

In an indictment for perjury before a select committee of the House of Commons, it was averred, that an election was had for a borough "*by virtue of a certain precept of the high sheriff of the county by him duly issued to the bailiff of the said borough of N. M.*" Held, that this was not a description of the precept, and that although the borough was therein differently denominated, the variance was immaterial.

Another count of the indictment stated, "that heretofore to wit, on the 11th day of May, in the 47th year, &c. at the borough of New Malton, in

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(*a*) I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *Vide* 2 Hawk. P. C. c. 46. s. 34, 35, 36. Compagnon *v.* Martin, 2 Bl. Rep. 790.

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the county of York, an election of two burgesses of the said borough, to serve as burgesses for the same at a certain parliament of our said Lord the King, to be holden at Westminster on the 22d day of June then next ensuing, was duly had and held, *by virtue of a certain precept of the high sheriff of the county aforesaid by him duly issued to the bailiff of the said borough of New Malton*, according to the exigency of a certain writ of our said Lord the King under his great seal of the United Kingdom of Great Britain and Ireland, before then duly issued and directed to the said sheriff; and that afterwards, by virtue of the said precept and writ, on the 12th day of May, in the said 47th year, &c. the honourable Robert Lawrence Dundas, and the right honourable Charles Winn Allanson, Lord Headley, *were returned* to serve as burgesses *for the said borough of New Malton*, at the said parliament then holden at Westminster aforesaid.

The precept of the sheriff being produced, appeared to be directed, "To the bailiff of the borough of *Malton*."

The Attorney General objected that this was a variance, as the indictment averred that the precept was issued to the bailiff of the borough of *New Malton*, which must be taken to be different from the borough of *Malton*.

Lord ELLENBOROUGH. This is not matter of description. If the precept was actually issued to the bailiff of the borough of New Malton, it is sufficient, whatever may be the tenor of the direction.

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The return made to the Crown Office stated, that the honourable R. L. Dundas and lord Headley were elected and returned as burgesses for the borough of *Malton*.

The Attorney General contended, that the allegation in the indictment must mean that these individuals were returned by the indenture, the only way in which the return could be made; which indenture proved that they had been returned for Malton, not for New Malton. Thus an averment, upon the truth of which the legality of all the subsequent proceedings depended, was left without evidence.

But the indictment having stated that "*A. B.* and *C. D.* were returned to serve as burgesses for the said borough of *N. M.*" this was considered a description of indenture of return, and the borough being therein stiled the borough of *M.* the variance was held fatal.

Scarlett for the prosecution insisted, that the indictment did not profess to set out the tenor of the return or the manner in which the members were returned; it simply stated the fact, that they were returned to serve as burgesses for the said borough of New Malton, which appeared sufficiently from the journals of the House of Commons concerning this election, in which the borough of Malton and New Malton were used indiscriminately.

Lord ELLENBOROUGH.—The averment as to the return must be understood as a description of a something in writing. The precept given in evidence requires an election to be made for the borough of Malton, and the return states that the honourable R. L. Dundas and lord Headley were elected to serve for the borough of Malton. But it is laid in the indictment, that they were returned for the borough of *New* Malton. Here it is not enough

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enough that the borough is known as well by one name as the other. I think the variance is fatal; and the defendant must be acquitted.

Not guilty.

Scarlett and *J. Williams* for the prosecution.

The Attorney General, Garrow, Park, Topping, and *Abbott,* for the defendants.

[Attornies, *Eyre* and *Morton.*]

Vide Purcel *v.* M'Namara, 9 East, 157.

Saturday, May 27.

REX *v.* WELTJE.

An indictment will not lie for words spoken of a justice of the peace in his absence.

THIS was an indictment for saying of ——— *Girdler*, esq. a Justice of Peace for the county of Middlesex, that he was *a scoundrel and a liar*. The words were charged to have been spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity.

It appeared that at a vestry meeting for the parish of Hammersmith, which Mr. Girdler did not attend, Mr. Weltje, with reference to a private quarrel between them, called him several very abusive names, declared he should have said the same had Mr. Girdler been present, and being reminded that he was speaking of a magistrate, said, he knew that very well.

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Lord ELLENBOROUGH. The words not being spoken *to* the Justice, I think they are not indictable. This doctrine is laid down by Lord HOLT in a case in *Salkeld* (*a*), and in Rex *v.* Pocock, in *Strange* (*b*), the court of K. B. refused to grant an information for saying of a justice in his absence that he was *a forsworn rogue*.—However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say, whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported, and it could not by any possibility be a misdemeanour to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex.

The defendant was acquitted.

Garrow, *Knapp*, *Alley*, and *Gleed*, for the prosecution.

The Attorney General and *Gurney* for the defendant.

[Attornies, *Aldridge* and *Impey*.]

(*a*) Regina *v.* Wrightson, 2 Salk. 698. per HOLT, C. J. "To say a justice is *a fool*, or *an ass*, or *a coxcomb*, or *a blockhead*, or *a bufflehead*, is not indictable." *Quod fuit concess. per* POWELL.

(*b*) 2 Str. 1157. *Vide* Rex *v.* Revel, 1 Stra. 420.

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Monday, May 29.

Gremaire v. Le Clerc Bois Valon.

Semble, that notwithstanding 3 H. 8. c. 11. which enacts, that no one shall practise as a surgeon in London, or 7 miles round, without being licensed by the college of surgeons, under the penalty of 5*l.* a month; a person who is not so licensed may maintain an action for business done as a surgeon within these limits, the statute containing no prohibitory clause: And at any rate, it is incumbent upon the defendant in such action to give evidence that the plaintiff is not regularly licensed as the statute directs.

INDEBITATUS assumpsit for work and labour, &c. Plea, the general issue.

It appeared that the parties to this suit are both French emigrant priests, resident in London, and that the plaintiff had cured the defendant of the *lues venerea* after a long attendance, in the course of which he had applied medicines to external sores, and performed several surgical operations. An acknowledgment by the defendant was given in evidence, that for this cure he owed the plaintiff 20*l.*

Clifford for the defendant contended, that the action could not be maintained, as the plaintiff was not a member of the college of surgeons. By statute 3 Hen. 8. c. 11. § 1. it was enacted, that to prevent smiths, weavers, and women, who took upon themselves great cures, in which they used sorcery and witchcraft, from intermeddling with surgery, no one within the city of London or seven miles round, should act as a surgeon, without being examined and admitted in the manner therein pointed out, under the pain of forfeiture of 5*l.* for every month any person should so act as a surgeon. And although by 34 & 35 Hen. 8. c. 8. § 3. liberty was given to any person having knowledge and experience of the nature of herbs, roots, and waters, &c. to practise, use, and minister,

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minister, in and to any outward sore, uncome, wound, &c. any herbs, ointments, &c. according to their cunning, experience, and knowledge; it was clear from the preamble to the statute, that this must be done gratuitously; the grievance there stated, being, that "the company and fellowship of surgeons of London, minding only their own lucres, had sued, troubled, and vexed divers honest persons, whom God had endued with the knowledge of the nature, kind, and operation of certain roots, herbs, and waters, *and yet the said persons had not taken any thing for their pains and cunning, but had ministered the same to poor people only for neighbourhood and God's sake, and of pity and charity.*" Accordingly, it was laid down in Com. Dig. tit. "*Physicians,*" (D.) that "this statute extends only to good women in the country, &c. who act for charity; not to those who administer for profit." Thus it clearly appeared, that the plaintiff in acting as a surgeon for profit, was guilty of a breach of the law, and therefore could not maintain an action to recover a compensation for what was illegal.

Garrow, contra, insisted that there being no absolute prohibition of persons unlicensed acting as surgeons, they might maintain an action against persons whom they had attended and cured. By paying the penalty of 5*l.* a month, they satisfied the statute. Besides, 34 & 35 Hen. 8. seemed framed for this very case, and being silent as to any reward to be received for such cure, the law must raise a promise on the part of the patient to pay his

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surgeon upon a *quantum meruit*, and never could annul an express promise which had here been given in evidence.

Lord ELLENBOROUGH was of opinion, that the action was maintainable, and the plaintiff recovered a verdict for 20*l.*

In the ensuing term, Clifford obtained a rule to shew cause, why the verdict should not be set aside, on the ground that the plaintiff's conduct in practising as a surgeon was illegal, and that he could not be entitled to recover a compensation for his labour on the very same evidence which would convict him of the penalty of 5*l.* a month. But when cause was shewn, the court said it had not been proved, that the plaintiff was not regularly licensed as a member of the college of surgeons, which he might be, although he was a French emigrant priest.—Rule discharged.

Garrow and *Lawes* for the plaintiff.

Clifford for the defendant.

[Attornies, *Raphael* and *Wrighte.*]

Vide Johnson *v.* Hudson, 11 East, 180. and Law *v.* Hodgson, next case.

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LAW *v.* HODGSON.

Monday, May 29.

An action cannot be maintained by a brickmaker for the price of bricks which are under the standard dimensions required by stat. 17 G. 3. c. 42. although, when sold, they were selected by the purchaser himself, and they were afterwards used by him in building a house, without any complaint being made as to their size or quality.

THIS was an action for goods sold and delivered, to recover the value of between five and six thousand bricks, which the defendant had bought from the plaintiff, a brick-maker; which he had himself selected from a large clamp of bricks at the plaintiff's manufactory; and which he had employed in building a house.

The defence was founded on 17 Geo. 3. c. 42. § 1. which enacts, that "all bricks which shall be "made or burnt for sale in any part of England, "shall, *when burnt*, be not less than eight inches "and a half long, and not less than two inches and "a half thick, *and not less than four inches wide.*" Sec. 2. of the same statute enacts, that if any person shall make bricks for sale of less dimensions, he shall forfeit the sum of 20*s.* for every thousand bricks so made.

It was proved that the bricks which were the subject of this action, were not, upon an average, more than 3¾ inches wide, and that they all fell short of the legal width of *four inches.*

Garrow for the plaintiff, contended, that the action was nevertheless maintainable. The legislature only meant to prohibit the making of bricks less than certain prescribed dimensions under a penalty, but did not declare all contracts concerning them

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null and void. The plaintiff might be liable to a penalty for making these bricks, and still be entitled to recover the value of them from the defendant. But in truth, it was quite impossible for a brick-maker to conform in every instance to the parliamentary standard; as bricks made in the same mould shrunk very differently in the burning, and it was therefore necessary to look to the honest intention of the brick-maker, which could not be doubted in the present instance. This defendant was, at all events, estopped from taking the objection, as he himself selected the bricks from a great many others, and by using them without any complaint of their size till the present day, he had given conclusive evidence of their sufficiency.

Lord ELLENBOROUGH. The penalty upon making bricks under the proper size is inflicted by a distinct section. The first section of this statute absolutely forbids such bricks to be made for sale. Therefore the plaintiff in making the bricks in question was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value. The manufacturer must take care that his bricks are of the statuteable size, and calculate the degree in which they are likely to shrink in the burning. The legislature has considered this to be practicable, and difficulty of compliance is no excuse for neglecting to do that which the legislature requires. The defendant when he selected the bricks is not proved to have known that they were under-sized, and his using them cannot alter the law.

Plaintiff

Plaintiff nonsuited.

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Garrow in the following term moved to set aside the nonsuit; but the court refused a rule to shew cause saying, that the best way to enforce an observance of the statute was, to prevent the violation of it from being profitable.

Garrow and *Bolland* for the plaintiff.

Park for the defendant.

[Attornies, *Willoughby* and *Dalston*.]

(a) *Vide* Johnson v. Hudson, 11 East, 180.—Gremaire v. Le Clerc Bois Valon, *ante*, 144.

HEYMAN and others *v.* PARISH.

Wednesday, May 31.

THIS was an action on a policy of insurance on the ship Canopus, at and from Plymouth to Gottenburgh.

Semble, that if a declaration on a policy of insurance lay the loss *by the perils of the seas*, the plaintiff may recover, upon proof that the ship was wrecked, although this may have been occasioned by the *barratry* of the master or mariners.

The declaration stated, that *by the perils and dangers of the seas*, and by the force and violence of the winds and waves, the ship struck upon rocks, and was thereby bulged, broken, and filled with water, wrecked, cast away, foundered, sunk, and wholly lost to the persons interested therein.

The plaintiffs' witnesses swore, that while the ship was working out of Plymouth harbour, with

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a pilot on board, she missed stays, and that notwithstanding every thing was done to save her which the pilot directed, she went ashore among the rocks, and was lost.

The defence was, that the loss had been occasioned by the misconduct of the captain. In support of this case, the pilot swore, that the captain sailed in a foul wind, contrary to his directions, having before refused to sail when the wind was fair; that in several other respects he disobeyed the witness's instructions, though informed of the consequences; and, finally, that the ship having been stopped when going on shore by getting out an anchor, the captain cut the cable, and allowed her to drift on the rocks.

Lord ELLENBOROUGH said, if the witness was believed, this was a clear case of barratry.

Park for the defendant, suggested, that there did not appear to be any fraud.

Lord ELLENBOROUGH. This is not necessary. It has been solemnly decided, that a gross malversation by the captain in his office is barratrous, (*a*)

Park then observed, that even if it were barratrous, as there was no count for barratry, the plaintiff could not recover.

(*a*) *Vide* Earl v. Rowcroft, 8 East, 126.

Lord

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Lord ELLENBOROUGH. I know that Mr. JUSTICE BULLER once held, that if you declare upon a loss by perils of the seas, and the defence is, the misconduct of those on board, and that misconduct, when proved, turns out to be barratrous, you cannot recover; but I have thought about it, and never could see the reason for that doctrine. Should it come before me, I think I should hold otherwise. If the plaintiff declare for a loss by perils of the seas, he cannot recover upon a loss merely barratrous, as a fraudulent sale, or the like. But here, the loss is proved as laid, and the barratry can be no surprize upon the defendant; for it is his own case.

The jury utterly disbelieved the pilot, and the plaintiff had a verdict.

The Attorney General, Topping, Jervis, and *Richardson,* for the plaintiff.

Garrow, Park, and *Carr,* for the defendant.

[Attornies, *Kaye & Freshfield* and *Gregg & Corfield.*]

VON TUNGELN *v.* DUBOIS.

Thursday, June 1.

If a ship insured is merely *represented* as neutral, a sentence of a foreign court of admiralty, condemning her for a violation of the laws of neutrality, is not evidence to falsify the *representation.*

THIS was an action on a policy of insurance on the ship *Neptunus,* at and from Bristol to Oporto, during her stay and trade there, and at and from thence back to London.

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The ship was not stated to be of any particular country in the policy; but in the letter directing the insurance she was described as "carrying the Kniphausen flag;" and in the broker's written instructions shewn to the underwriters, she was called *a Kniphausen vessel.*

The captain swore, that the Neptunus belonged to *Varrel*, a port in the Kniphausen territory; that she was properly documented according to the laws and regulations of that principality; and that she was captured on her voyage back from Oporto to London, and carried into Dunkirk.

The defence was rested on the decree of the French admiralty court, which condemned the ship for the following among other reasons: 1. That she had suffered herself to be searched by the English. 2. That she had put into an English port. 3. The inimical quality of the vessel, which in November 1805 belonged to an English subject then an enemy, and was purchased from him by the present claimant, that sort of acquisition made after the commencement of hostilities being proscribed by the regulations of 26th July 1778. 4. The deficiency as to the certificate of origin.

Park for the defendant, contended, that this sentence was a complete bar to the present action, as it proved conclusively that the ship was not neutral property, and that she had not been navigated according to the laws of neutrality. Some of the regulations which the Neptunus was charged in the sentence with having broken, might not be binding

binding upon neutral states. But in *Bolton v. Gladstone*, 5 East, 155. it was decided, that if a neutral be condemned for not conforming to a French ordinance which is not binding upon the state to which she belongs, the sentence is conclusive evidence against the assured. Lord ELLENBOROUGH there said, "the French prize court was competent to decide upon the neutrality of the ship; and if in the professed exercise of its functions, it has decided upon that point, its decision must conclude the question." Besides, it was held in *Baring v. the Royal Exchange Assurance Company*, 5 East, 99. that if in a foreign sentence there be several grounds of condemnation set forth, and one of them be a good and legal ground, it will be conclusive against the neutrality, though joined to several bad ones. Now there could be no doubt, that if the Neptunus belonged to a British subject after the commencement of hostilities between Great Britain and France, that fact was of itself a sufficient ground for the condemnation.

Lord ELLENBOROUGH. The difference between this case and those cited is, that here there is no *warranty of neutrality*. In *Bolton* v. *Gladstone*, the ship and goods were *warranted* Danish property; and in *Baring* v. *The Royal Exchange Assurance*, they were *warranted* American. Here the letter and instructions directing the insurance to be made, cannot amount to more than a *representation* that the Neptunus was a Kniphausen vessel, and consequently neutral property. Therefore, if she was in reality documented and navigated according to

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to the laws of the state to which she belonged, the sentence of a foreign court will not invalidate the policy. On the other hand, had there been a *warranty* of neutrality, the sentence might have been conclusive. In *De Souza* v. *Ewer* (*a*), Lord Kenyon held that a sentence proceeding upon the violation of the particular ordinance of a belligerent state, falsified a warranty of neutrality; and though that case was afterwards doubted by Lord Kenyon himself, it has since been again set up at the Cock Pit. As to the present case, if you think, upon consideration, that there is any thing in it, you may move it in term.

The plaintiff had a verdict, which was acquiesced in.

Garrow and *Marryat* for the plaintiff.

Park and *Richardson* for the defendant.

[Attornies, *Swain, Co.* and *Gibbs.*]

(*a*) Reported in the first four editions of Mr. Park's book on insurance, p. 361. but omitted in the subsequent editions of that valuable work, Ld. Kenyon having declared that it could not be considered as an authority. *Vide* 8 T. R. 444 *n.*

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KELLY and others *v.* WALTON.

Sittings after M. T. 1808.

THIS was an action on a policy of insurance on a cargo of flax seed by an American ship, at and from her port or ports of loading in the United States, to her port or ports of discharge in Ireland.

On the 23d December 1807, the ship was ready to sail, with the cargo on board, from Philadelphia to Limerick, when she was detained by the American embargo (*a*).

The assured, residing at Limerick, were informed of this event on the 11th of February 1808, but did not give notice of abandonment to the underwriters in London, till the 11th of June following.

The plaintiffs proved that the flax-seed insured was for the purpose of sowing in Ireland; that by an Irish statute, no flax-seed can be sold for sowing in that part of the United Kingdom, unless of the growth of the preceding year; that the season for sowing commences in March, and ends on the 10th of May; and that if the embargo had been taken off after lasting a month or two, the flax-seed would probably have sold rather under the invoice price, upon its arrival in Ireland; but that after

The owner of a cargo of flax-seed insured "at and from America to Limerick," himself residing at that place, on the 11th February 1808, received information that the ship with the flax-seed on board had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th of June following. The flax-seed was intended for sowing, and might have been employed for that purpose, had it arrived before the 10th of May, but afterwards would have been scarcely of any value. Held, that however the plaintiff might have waited till the 10th of May before abandoning, the abandonment on the 11th of June was out of time.

(*a*) *Vide* Conway *v.* Gray, 10 East, 536.

the

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the flax-seed time was over, it could only have been crushed for oil, and would have been of very little value.

Marryat, for the defendant, insisted that the assured had not made their election to abandon in time; and cited the case of *Anderson* v. *The Royal Exchange Assurance Company*, 7 East, 38. where intelligence of the loss being received on the 2d of February, an abandonment on the 18th of the same month was held too late.

The Attorney General, contrà, contended that the special circumstances of this case took it out of the general rule. The plaintiffs had a right to wait while there was a possibility of the flax-seed arriving in time for being sown, and afterwards to abandon. They did not speculate for their own advantage, as the cargo, if it had arrived, would have sold at a loss, and they acted a much honester part than if they had abandoned, the moment they heard of the embargo, although it was likely to be temporary. Upon the expiration of the time for sowing, there was a new ingredient in their case; and the article insured ceasing to be of any value to them, they were entitled to come upon the underwriters for an indemnity.

Lord ELLENBOROUGH. A complete right of abandonment certainly existed on the 11th of February, when the plaintiffs heard of the ship being detained. But they did not abandon; and their right to do so arising from the embargo merely,

merely, was gone. It is said, however, that a new state of things arose at the expiration of the season for sowing flax-seed in Ireland. Supposing a right of abandonment then to have revived, I am afraid it has not been exercised with sufficient promptitude. The sowing season ended on the 10th of May; the abandonment was not made till the 11th of June; and according to several decided cases, particularly the recent one of *Anderson* v. *The Royal Exchange Assurance Company*, this was out of time.

Verdict for the defendant.

The Attorney General, *Park*, and *Scarlett* for the plaintiffs.

Marryat for the defendant.

[Attornies, *Alcock* and *Swain*.]

Vide Barker v. Blakes, 9 East 283.

JOSIAH BOYDELL *v.* DRUMMOND, Esq.

Sittings after M. T. 1808.

THIS was an action for not accepting and paying for a set of prints from the plays of Shakespeare, according to the undertaking, into which it was alleged the defendant had entered by subscribing to the work.

An advertisement published in several daily newspapers, is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading, one of the newspapers in which it appeared.

Pleas,

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Pleas, 1. *non assumpsit.* 2. *actio non accrevit infra sex annos.*

In December 1786, the plaintiff and his late partner, Alderman John Boydell, circulated proposals for publishing by subscription a series of large prints from some of the scenes in Shakespeare's plays, after pictures to be painted for that purpose: the prospectus stated that seventy-two scenes were to be published, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints, at the price of two guineas a number; that two guineas were to be paid at the time of subscribing, and on the delivery of each number, the remaining guinea for that was to be paid, together with two guineas in advance towards the succeeding number; that one number at least should be published annually after the delivery of the first, and that the proprietors were confident they should be able to produce two numbers within the course of every year. On the 7th of April 1790, after many of the pictures had been painted and exhibited in the Shakespeare gallery, the defendant became a subscriber, by signing his name in a book entitled, "*Shakespeare Subscribers, their signatures,*" which contained a mere list of names without any reference to the prospectus or the conditions upon which the work was to be carried on. The first number was published in June 1791, and the second in March 1792. Both of these were delivered soon after publication to a person who called for them at the gallery in Pall Mall in the defendant's name, and paid for them, together with

with the sum in advance, according to the terms of the prospectus. One or two numbers were afterwards published annually; till the whole work was completed in 1803. Copies of the different numbers were regularly laid by for the defendant; but they were not called for, and he was never required individually to carry them away and pay for them till the year 1807.

Various interesting points arose in the course of the trial; but there were two only upon which the Chief Justice gave his opinion so decisively at nisi prius as to authorize their being reported.

To obviate an objection, that from their having been no personal demand upon the plaintiff for near 20 years to take any one number of the work, and from his having taken none, the contract must be supposed to have been mutually abandoned, the plaintiff's counsel undertook to shew that the defendant had from time to time received regular notice, through the medium of a public advertisement, of the numbers being ready for delivery, and had been requested to send for them. For this purpose it was proposed to give in evidence certain advertisements addressed, "to the subscribers to the Shakespeare prints," which had been published in a newspaper called *The Oracle*.

Lord ELLENBOROUGH said, that before the advertisements could be received in evidence, it must be proved that the defendant was in the habit of reading the newspaper in which they appeared.

A witness then stated, that they had been inserted in almost all the daily papers, and that upon a similar

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a similar notice being given of the publication of the first two numbers, they had been carried away by some person in the name of the defendant.

The Attorney General contended, that under these circumstances, the advertisements were admissible evidence, and that the publication of this work being a matter of such general concern and notoriety, the defendant must be taken to have read the advertisements concerning it.

Lord ELLENBOROUGH. The responsibility of carriers is a subject of more general interest, and the only evidence admitted of notice to all who deal with them of any thing special in their contracts, is a board stuck up in their offices inscribed with large letters, communicating the intended information. I cannot admit the evidence offered, without holding an advertisement in the newspapers a general notice to all mankind.

The plaintiff not being prepared to shew, that the defendant was accustomed to read any newspaper in which the advertisements appeared, they were rejected (*a*).

If a cause of action arising from the breach of a contract to do an act at a specific time, is once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of the statute.

A question afterwards arose, whether the action was not barred by *the statute of limitations?* The plaintiff's counsel, (protesting, that as this was one continuing contract, the statute could not begin to operate till the work was completed) contended,

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(*a*) *Vide* Lord Gallway *v.* Matthew, 10 East. 264.

that

that even supposing it to have run as to each particular number from the time when that was published, still the case was completely taken out of the statute by an acknowledgment from the defendant, which revived the plaintiff's remedy.

A letter from the defendant was accordingly given in evidence, which was dated 1st April 1807, and in which he says, "I ceased taking in the numbers of the Boydell Shakespeare many years ago, in consequence of the engagement not having been fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, I do not consider myself called upon to complete the set."—It was likewise proved, that the defendant had lately observed, that "he had refused to take them in, because they did not answer his expectations."

The Attorney General insisted, that the defendant's letter and declaration took the case entirely out of the statute of limitations, as he had within six years acknowledged the existence of the contract, and that he had broken it. If a debt is claimed, and refused on a particular ground, the statute cannot afterwards be resorted to. If a man is asked to pay a sum of money which was due in 1798, and he says, "it is not due; I have paid you, as I will shew you by your receipt;" this would take the case out of the statute, and unless a receipt was produced, the money would be recoverable.(*a*) So here the defendant says, "I refused to take in

(*a*) *Vide* Heyling *v.* Huskins, 1 Salk. 29.—Trueman *v.* Fenton, Cowp. 548.—Lawrence *v.* Worral, Peak. N. P. Cas. 93.

BOYDELL v. DRUMMOND.

the Boydell Shakespeare, because the engagement was not fulfilled on the part of the proprietors,—because the prints did not answer my expectations." Therefore this brought the case to the question, whether the engagement on the part of the proprietors had been fulfilled,—and whether the work was such as ought to have answered the *reasonable* expectations of the defendant.

Lord ELLENBOROUGH, without giving any decided opinion upon the general question, said, that the defendant's liability could not be affected by the letter or declaration. He has only acknowledged that he was guilty of a default ten or twelve years ago. How does this shew that the plaintiff has any cause of action which has accrued within six years? If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract. This is like the case of *criminal conversation*, where the defendant being accused, shortly before the commencement of the suit, of having seduced the plaintiff's wife, said, *he had not been guilty within six years*. That allowed that there was once a cause of action; but the statute was held to be a bar.

It was likewise debated, whether the contract did not require to be stamped? Whether it was not void by the 4th section of the statute of frauds, as being an agreement not to be performed within a year,

year, and not being evidenced by any note or memorandum in writing, signed by the party to be charged? And whether the defendant was not, at any rate, at liberty to withdraw from it when he chose, upon forfeiting two guineas?

The plaintiff was at last nonsuited, with leave to move; and the court afterwards confirmed the nonsuit, on the *statute of frauds*, without giving any opinion as to the stamp, the statute of limitations, the abandonment, or the obligatory nature of the subscription.

Lord ELLENBOROUGH in the course of the argument adhered to his determination concerning the evidence of notice, and the other point as to the effect of the acknowledgment was not pressed *in banco*.

The Attorney General, *Garrow*, *Marryat*, and *Bolland*, for the plaintiff.

Park, *Holroyd*, and *Dampier*, for the defendant.

[Attornies, *Crowder* and *Fynemore*.]

BOULTON and another *v.* DOBREE.

Sittings after M. T. 1808.

THE first count of the declaration was upon a policy of insurance on the ship Neutrality, at and from Vera Cruz to London, with permission to

If to a plea, that *A.* for whose benefit the action is brought, is an *alien enemy*, the replication state that *A.* is resident in this country by the licence of our lord the King; to support an issue taken upon this fact, it is not enough for the plaintiff to prove that a licence was granted by our King to *A.* while an alien *amie* to undertake a voyage to a foreign country, and from thence to England, which did not terminate till after the commencement of hostilities between his country and ours, and that after the termination of the voyage he went about at large here, without being molested by the English government.

BOULTON v. DOBREE.

touch and take in goods at the Havannah. The interest was averred to be in Halvor Elieson.—The money counts followed.

Pleas, 1. The general issue to the whole declaration. 2. To the special count, that the promise therein mentioned was made to the plaintiffs as the agents of Halvor Elieson; that Halvor Elieson is a subject of the King of Denmark, between whom and our King there is an open war; "and that the said Halvor Elieson was and still is an enemy of our said Lord the now King, adhering to his enemies, and not resident within the dominions of our said Lord the now King under or by virtue of any letters of safe conduct or any licence or protection of our said Lord the now King."

Replication, "that the said Halvor Elieson before the commencement of the said action was, and from thence hitherto hath been, and still is resident within the dominions of our said Lord the now King, by the licence and under the protection of our said Lord the now King;"—concluding to the country.

The plaintiffs gave in evidence a licence, dated 22d January 1807, under the King's sign manual, mentioning by name the Danish ship Neutrality, Halvor Elieson master, and authorizing her upon certain conditions to undertake the voyage in question. It likewise appeared, that the ship being lost near the coast of Ireland, captain Elieson came to London about six months ago, and has resided here

here ever since, without any restraint whatever being put upon his person. BOULTON v. DOBREE.

Lord ELLENBOROUGH. The plaintiffs are bound to shew that Elieson is resident in this country by the licence of our Lord the King. What do you tender as a licence for this purpose?

The Attorney General. The licence legalizing the voyage. That authorizes Halvor Elieson to go with his ship to an enemy's country, and to import a cargo from thence into Great Britain. It therefore operates as a licence to his residing here to manage the concerns necessarily growing out of the voyage. He has been proved to be resident within the dominions of our Lord the King, and he clearly is so "by the licence and under the protection of our said Lord the King." This is the issue.

Lord ELLENBOROUGH said, Elieson could not under these circumstances be considered as an alien enemy residing in this country with the King's licence. Although he went at large, it did not appear that government knew he was in the kingdom. To support the replication, it was necessary either to produce a protection granted to Elieson as an alien enemy, or to shew in some way, that his stay here had been sanctioned by the King after the commencement of hostilities with Denmark.

The plaintiff was nonsuited, and the court of K. B. afterwards refused to set aside the nonsuit.

BOULTON v. DOBREE. *The Attorney General*, *Garrow*, and *Puller*, for the plaintiff.

Park, *Marryat*, and *Carr*, for the defendant.

[Attornies, *Blunt* and *Gregg*.]

Vide Kensington v. Inglis, 8 East, 273.

Sittings after M. T. 1808.

CROSBY and another, Assignees of BOUCHER, a Bankrupt, v. CROUCH.

If *A.* a shopkeeper, procure *B.* to discount accommodation bills drawn by him and accepted by third persons, and *B.* afterwards require *A.* to give him a collateral security for the payment of the bills; upon which *A* secretly deposits with him a quantity of goods from his shop, to be sold for *B.*'s benefit if the bills should not be paid, and soon after, *A.* becomes bankrupt, and the bills are dishonoured: the depositing of the goods in this manner as a security, cannot be invalidated as a voluntary preference in contemplation of bankruptcy.

TROVER for books and stationary.

The bankrupt, who was a bookseller, in September 1807 applied to the defendant a pawnbroker, to discount three bills for him for £. 50. each, which he had drawn upon two persons of the names of *Jones* and *Young*.

The defendant gave him cash for them; but soon after, becoming suspicious of the bankrupt's credit, he asked him, whether they were not accommodation bills. The bankrupt answered, that they were. The defendant then required some security to be put into his hands, in case the bills should not be paid when they became due. In consequence of this application, the bankrupt at different times between November and February, deposited with

the

the defendant various parcels of books to the value of about £. 300, for the purpose of being sold for his benefit if the bills should not be duly honoured by the acceptors. These books were chiefly brought by the bankrupt in a hackney coach in the evening. It likewise appeared, that he had compounded with his creditors two or three years before, which circumstance must have been known to the defendant, who had assisted him to pay the stipulated composition. *Boucher* committed an act of bankruptcy in the beginning of March, and the commission was sued out against him on the 17th of that month. The bills still remain in the defendant's hands unsatisfied.

It was contended on the part of the plaintiffs, that the defendant had unduly obtained possession of the books by a voluntary preference in contemplation of bankruptcy.

Lord ELLENBOROUGH: How is this a case of voluntary preference? The bankrupt parted with the books upon the defendant's importunity. The bills were not due, but the bankrupt was liable upon them, and the defendant had a right to ask for farther security.

The Attorney General for the plaintiffs. This security was given fraudulently. The defendant knew that the bankrupt had lately compounded with his creditors; and the manner in which the books were conveyed shows the sense which both parties entertained of the transaction. No security was

CROSBY v. CROUCH.

taken when the bills were discounted, and the defendant could not demand any before they were due. Till then he had no right of suit. The principle upon which the demand of a debt actually due prevents payment, or the giving of security, from being deemed a fraudulent preference is, that by means of legal process, the creditor has it in his power instantly to arrest the debtor, to compel satisfaction. Here the debt was not due, and was only contingent. No such proceeding, therefore, was open to the defendant. His threats, if he used any, were *brutum fulmen*. It follows, that the preference shewn him by the bankrupt, was voluntary, fraudulent, and void.

Lord ELLENBOROUGH. The defendant had not a right of action when the books were deposited with him; but the bills constituted a good petitioning creditor's debt, and might have afforded him the means of compulsion. Strictly, only the acts of a trader subsequent to his bankruptcy are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws. The cases upon the subject have gone far and far enough, and I am not disposed to give them any extension. If the debt had been due here, the preference certainly would not have been fraudulent. It wants *voluntariness*, in which the fraud consists. The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been, that he might resort to a suit to enforce payment, but that his

his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of farther security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone, transactions previous to the bankruptcy can be set aside.

The plaintiffs were nonsuited; and the case being afterwards brought before the court of K. B. the Judges were unanimously of opinion, that the nonsuit should stand.

The Attorney General, *Garrow* and *Lawes*, for the plaintiffs.

Park and *Marryat* for the defendant.

[Attornies, *Watkins* and *Cockayne*.]

Vide Thompson v. Freeman, 1 T. R. 155.—Hartshorn v. Slodden, 2 Bos. & Pul. 582.—Bayley v. Ballard, 1 Campb. 416.

COURT OF COMMON PLEAS.

1809.

ADJOURNED SITTINGS IN LONDON AFTER EASTER TERM, 49 Geo. III.

FRAZER *v.* HOPKINS and LONG.

To prove that A. is liable as registered owner of a ship, entries in the custom house books of the port of London and of the outport to which the ship belongs, stating that she was transferred to *A.* by *B.* the original owner, are not sufficient evidence.

THIS was an action for repairs done to a ship.

The plaintiff sought to charge the defendants as the registered owners (*a*). To prove that they were such at the time when the cause of action accrued,—

Mr. *Sentence*, from the custom house in the port of London, was called. He produced a book kept at the custom house, which contained an account of the registers and transfers of ships belonging to the outports; and from this he read an entry, stating that on such a day, the ship in question, which had been originally registered at *Harwich* in the names of *Hearne* and *Sprankling*, was transferred by them to the defendants, *Hopkins* and *Long*; who appeared to continue the registered owners. He said that this entry had been made in the usual

(*a*) *Vide* Rich *v.* Coe, Cowp. 636.—Westerdell *v.* Dale, 7 T. R. 306.—Young *v.* Brander, 8 East, 10.

form,

form, in consequence of a letter from the custom house at Harwich, announcing that an entry had been made there to that effect.

A clerk from the custom house at Harwich was afterwards called, and produced the *register book* kept there, in which the entry above alluded to appeared: but the plaintiff neither put in the original certificate of registry indorsed as directed by 7 & 8 W. 3. c. 22. s. 21. 26 G. 3. c. 60. s. 16. and 34 G. 3. c. 68. s. 15. nor a register *de novo* under 34 G. 3. c. 68. s. 21. nor offered evidence of any oath taken or act done by either of the defendants as owners of the vessel.

Shepherd, Serjeant, contended that these entries were insufficient to prove that the property in the ship had been transferred to the defendants, and still less to charge them as owners. It was clearly necessary to produce some instrument concerning the transfer to which they were parties, or to shew that they had done something to acknowledge themselves to be owners of the ship; otherwise, an entry of this sort might be made without the privity of the supposed purchaser, and a man who had never any thing to do with shipping in his life, might be rendered liable for the repairs of half the ships in the river Thames.

Best, Serjeant, *contra*, insisted that the defendants were bound by these entries in the custom house books, and if the entries were false, that they must take their remedy against the officers who made them. The entries were acts of office to which credit

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FRAZER v. HOPKINS.

credit must be given. The presumption was in favour of the regularity of such entries, and the court must suppose that they were warranted by a register de novo, or an indorsement made upon the old one, with all the requisite forms. After a positive statement of the transfer in the books of the custom-house, we must presume *omnia rite acta.* One great object of the register acts was, to enable the public to ascertain who are the real owners of ships. The books produced are kept for that purpose. But they would only mislead and do mischief, if it could be said to a man who had repaired a vessel upon the faith of the ostensibly registered owners being responsible persons, that they have nothing to do with her, and that he must hunt after the secret owner, who when found may be a bankrupt.

Sir JAMES MANSFIELD, C. J. These defendants may be the legal owners of this ship; but I think you have not proved that they are. The custom house books by themselves cannot be sufficient to charge the defendants, unless they are made evidence for this purpose by act of parliament. There is no proof to connect *Hopkins* or *Long* with the entry relied upon; and for aught that appears, they were ignorant of its existence till it was produced in court. Perhaps the oath taken by them upon the transfer would be sufficient, but at present you have established no connection between them and the property in the ship in question. And unless a clause in an act of parliament or a decided case is adduced in support of this evidence, I must order the plaintiff to be called. It

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FRAZER v. HOPKINS.

It was agreed that the plaintiff should be non-suited, with liberty to move to enter a verdict for £. 157.

Accordingly, a motion for this purpose was made the ensuing term; but the court of C. P. refused a rule to shew cause.

Best, *Vaughan*, Serjeants, and *Espinasse* for the plaintiff.

Shepherd and *Lens*, Serjeants, for the defendants.

Upon the principle that the assignee of a term is not liable, unless he assent to the assignment, (Eaton v. Jaques, Doug. 461. Turner v. Richardson, 7 East, 335.) it may be argued that the transferree of a ship is not liable, unless he assent to the transfer. Q. How far this will be presumed, on production of an official instrument which could not regularly be obtained without the oath of the person sought to be charged as owner?

Vide Camden v. Anderson, 5 T. R. 709.—Westerdell v. Dale, 7 T. R. 306.—Young v. Brander, 8 East, 10.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in Trinity Term,

49 GEORGE III.

FIRST SITTINGS AT WESTMINSTER.

1809.

MONPRIVATT *v.* SMITH and another, Sheriff of Middlesex.

Wednesday, June 7.

TRESPASS for breaking and entering the plaintiff's house, staying therein three weeks, and seizing and carrying away his goods.

To trespass for breaking and entering a house and staying therein three weeks, the defendant pleads a justification as to breaking and entering and staying in the house 24 hours. The plea covers the whole declaration.

Pleas, 1. Not guilty to the whole. 2. As to breaking and entering the house, and staying therein *twenty-four hours, part of the said time in the said declaration mentioned*, and also as to seizing and carrying away the goods, a justification under a writ of *fieri facias*.—Replication to last plea, admitting the writ, *de injuria sua propria absque residuo causæ*.

The

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The defendants proved their justification; but it appeared, that their officers continued in the plaintiff's house *beyond twenty-four hours.*

Garrow and *Wigley* for the plaintiff, contended, that the excess beyond twenty-four hours stood merely upon the plea of *not guilty*, and as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered.

Lord ELLENBOROUGH. I am of opinion, that the last plea, in point of law, applies to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. As the pleadings now stand, *the residue of the cause* mentioned in the plea is alone put in issue, and the length of time during which the officers remained in the house is rendered immaterial.

The plaintiff was nonsuited.

Garrow and *Wigley* for the plaintiff.

Park, *Marryat*, and *Laws*, for the defendants.

In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the expulsion is merely aggravation, and a justification as to breaking and entering will cover the whole declaration. Taylor v. Cole, 3 T. R. 292.—1 H. Bl. 555, S. C. So in trespass for taking goods and converting them to the defendant's use, it is enough to justify the taking, and

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and if the plaintiff means to rely upon the conversion, he is driven to a new assignment, Dye v. Leatherdale, 3 Wils. 20. Fisherwood v. Cannon, 3 T. R. 297. And in trespass for impounding cattle and keeping them so close that they died, a plea justifying the impounding of the cattle is prima facie a complete defence to the action. Gates v. Bayley, 2 Wils. 313. It seems to be a general principle, that where the defendant answers what may reasonably be considered the *gist* of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment, that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning. *Vide* Cheasley v. Barnes, 10 East, 73.

FIRST SITTINGS IN LONDON.

STEWART *v.* KENNETT.

Thursday, June 8.

ACTION against the defendant as indorser of a bill of exchange.

Notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorised by him.

The only question was, whether the defendant had received due notice of the bill being dishonoured for non payment?

To prove this, a witness of the name of *Cutler* was called, who swore, that he had been employed by the original parties to the bill to get it discounted; that when it became due, it was in the hands of one *Abbott*, to whom the plaintiff had indorsed it; that the day after, the witness met the defendant, and told him it had not been paid;

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STEWART v. KENNETT.

that the defendant asked who held it, and that the witness answered, *it lies at Messrs. Bonds', Abbott's bankers.*

Park for the defendant, objected that this was insufficient; that knowledge is not notice, and that the intimation of the dishonour of the bill must come from the holder of it.

Garrow, contra, contended, that the notice given by Cutler, not only possessed the defendant of the same information, but placed him in the same situation, as if it had come directly from the indorsee. What was there to hinder him from immediately taking up the bill and resorting to the acceptor, the drawer, or prior indorsers? Besides, Cutler having been employed to get the bill discounted, might well be considered as an authorized agent to give the notice; and even if he had no original authority to give the notice, the plaintiff adopted it by bringing this action.

Lord ELLENBOROUGH. If you could make Cutler the agent of the holder of the bill, the notice would be sufficient; but in reality he was a mere stranger. The bill when dishonoured, lay at the bankers of Abbott, with whom Cutler had no sort of connection. But the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact. In this case, Cutler was not possessed of the bill, and had no controul over it. The defendant therefore is not proved to have had any legal notice of the dishonour of the bill, and is discharged

discharged from the liability he contracted by indorsing it. 1809.

STEWART v. KENNETT.

Plaintiff nonsuited.

Garrow and *Wigley* for the plaintiff.

Park and *Lawes* for the defendant.

Vide Esdaile v. Sowerby, 11 East, 114.

WITHALL v. MASTERMAN and others. Thursday, June 8.

MONEY had and received. Plea, the general issue.

The holder of a bill of exchange, on its becoming due, allows the acceptor to renew it, without consulting the indorser; but the indorser afterwards says to the acceptor, it *was the best thing that could be done.* This is not a recognition of the terms granted by the holder to the acceptor, and the indorser is discharged.

The defendants were the plaintiff's bankers, and this action was brought to try whether they were bound to give him credit in account for a sum of £. 345. 7*s.* 10*d.*

He had indorsed to them a bill of exchange for this amount, accepted by one *Ross.* When the bill became due *Ross* was unable to pay it, and they took from him, without previously consulting the plaintiff, another bill on one *Etherington*, which was never satisfied. A week after, *Ross* met the defendant, and told him he had taken up his acceptance by another bill, when the defendant approved of it, and said, *it was the best thing that could be done.*

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WITHALL v. MASTERMAN.

Garrow for the defendants insisted, that this ratification was equivalent to a previous authority, and that the plaintiff must be taken to have consented to the substitution.

Lord ELLENBOROUGH.—This is a very hard case, and I should be glad if any sufficient authority or recognition could be proved. But the plaintiff does not appear to have recognized the act of the defendants. His approbation of what had been done must refer to the acceptor of the bill, to whom it was evidently advantageous. The holders had no right to make terms with the acceptor, and by so doing they discharged the indorser. They were therefore bound to give him credit in account for the amount of the bill.

Verdict for the plaintiff.

Park and *Reader* for the plaintiff.

Garrow and *Marryat* for the defendants.

But if the holder of a bill of exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answer, "You may "do as you like, for I am dis- "charged for want of notice," and it appear that due notice was given, the holder may still sue the drawer after taking security from the acceptor.—Clark *v.* Delvin, 3 Bos. & Pul. 363.—*Vide* etiam Tindal *v.* Brown, 1 T. R. 167.—English *v.* Darley, 2 Bos. & Pul. 61.

SECOND SITTINGS AT WESTMINSTER. 1809.

POCOCK *v.* EUSTACE.

Monday, June 12.

In an action for use and occupation, the property tax will not be deducted at nisi prius from the rent due.

THIS was an action for use and occupation, in which the rent the plaintiff sought to recover was clearly proved to be in arrear.

Wigley for the defendant contended, that the property tax ought to be deducted from the amount of the rent, as the tenant was liable for this in the first instance, and the landlord was bound under a penalty to allow the deduction on demand. Therefore the real sum due was, the residue of the rent after the property tax was deducted, and for so much only ought the verdict to pass.

Lord ELLENBOROUGH.—It would be impossible for the business of the court to be transacted if we were to enter into these calculations at *nisi prius*. In such an action as this, the plaintiff must recover the amount of the rent in arrear, and the parties must settle out of court the deductions to which the tenant is entitled. It is only on the production of a certificate of the tax being paid, that the landlord is bound to make the allowance, and their respective rights upon this subject cannot be determined without a laborious consideration of the property-

1809. property-tax acts, which are not remarkable either for brevity or perspicuity.

POCOCK v. EUSTACE.

Verdict for the rent in arrear.

Garrow and *Reader* for the plaintiff.

Wigley for the defendant.

[Attornies, *Lockett* and *Adams*.]

SECOND SITTINGS IN LONDON

Thursday, June 15.

CRITCHLOW *v.* PARRY.

In an action against the indorser of a bill of exchange, it is not necessary to prove any indorsements on the bill prior to the defendant's.

ACTION by the indorsee against the indorser of a bill of exchange.

The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff.

A question arose, whether upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers.

Lord ELLENBOROUGH at first doubted, whether it was not necessary in this case as well as in an action against the acceptor, to prove all the indorsements that were mentioned in the declaration, and particularly that of the original payee.

Clarke

1809.

CRITCHLOW v. PARRY.

Clarke for the plaintiff contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged, he would be liable; that he was to be considered as the drawer of a new bill of exchange; and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom therefore, a title through the payee must be established.

Lord ELLENBOROUGH was of this opinion, and the plaintiff had a verdict.

The action was undefended.

[Attornies, *Windle* and *Cooper*.]

So in an action against the indorser of a bill, the hand-writing of the drawer need not be proved. Lambert *v.* Pack, 1 Salk. 127. Lambert *v.* Oakes, S. C. 1 Lord Raym. 443. But in an action by an indorsee against the drawer, the indorsement of the payee must be proved, although the bill with the indorsement upon it was shewn to the defendant after it was due, and he did not then object to the title of the holder. Duncan *v.* Scott, 1 Campb. 101. And in an action against the acceptor, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. Smith *v.* Chester, 1 T. R. 654.

[It may be useful to subjoin the following note here, although the case did not occur till the sittings after term.]

Sittings after T. T. 49 G. III.

WILLOCK assignee of WESTMACOTT, a bankrupt, *v.* SMITH.

In actions by assignees of bankrupts, to which the general issue was pleaded before the passing of Sir Samuel Romily's act, 49 Geo. III. c. 131. it is unnecessary for the plaintiffs to prove the trading, act of bankruptcy, or petitioning creditor's debt: but, under these circumstances, a judge would give the defendant leave to withdraw his plea, and plead it *de novo* with the notice described in the 10th sect. of the above statute.

INDEBITATUS assumpsit for work and labour, &c. Plea, *the general issue*, which had been pleaded before the passing of Sir Samuel Romily's act, 49 Geo. III. cap. 131.

It was contended, that as the defendant had no opportunity to give the notice pointed out by the 10th sect. of that statute, this case did not come within its provisions, and the plaintiff was still bound to prove the trading, act of bankruptcy, and petitioning creditor's debt.

Lord ELLENBOROUGH. The statute says, that in any action *brought or to be brought* by any assignee of a bankrupt, the proceedings under the commission shall be evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the defendant before, or at the time of his pleading, give notice that he means to dispute these matters, or any of them. Therefore, where no such notice is given, the proceedings under the commission must be sufficient. If the defendant had wished to contest the validity of this commission, he might have obtained leave, by a judge's order, to withdraw his plea, and plead it again with a notice suitable to his case; but as he has not done so, I must presume that he comes here only to deny the existence of the debt demanded.

Park and *Espinasse* for the plaintiff.

Garrow for the defendant.

This note was cited in Clarkson *v.* Dadds, C.P. Sittings after T. T. *Cor.* MANSFIELD C. J. who recognized and acted upon the decision.

Errat. Some mistakes have occurred as to the order in which the cases of Easter Term are arranged. Those from p. 117. to p. 149. were tried at Westminster, and those which follow, in London.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term,

49 GEORGE III.

FIRST SITTINGS AFTER TERM IN LONDON.

1809.

Friday, June 23.

LAXTON *v.* PEAT.

ACTION by the indorſee againſt the acceptor of a bill of exchange.

If the indorſee of a bill of exchange, having notice that it was accepted without conſideration, receive part payment from the drawer and give him time to pay the reſidue, he thereby diſcharges the acceptor.

The bill was drawn by one *Hunt*, and accepted for his accommodation by the defendant. The plaintiff gave value for it; but had notice of the circumſtances of its original formation. When it became due, he received part payment from *Hunt*, and gave him time to pay the remainder, without the concurrence of the defendant.

N. C. Clarke for the plaintiff contended, that the defendant was ſtill liable for ſuch part of the ſum

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mentioned in the bill as remained unpaid. Although the drawer might be discharged by the holder's giving time to the acceptor, it had been decided that nothing would discharge the acceptor but satisfaction of the bill or an absolute renunciation of all claim upon him in respect of it (*a*).

Lord ELLENBOROUGH.—This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer, and in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal (*b*). The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant, and accepted by *Hunt* in consideration of a debt due. According to many authorities, the defendant, upon that supposition, would have been discharged, by the time given to *Hunt*; and the principle of these authorities applies with equal strength to the facts actually given in evidence.

(*a*) Dingwall *v.* Dunster, Doug. 247.

(*b*) Rees *v.* Berrington, 2 Ves. Jun. 540. Clark *v.* Devlin, 3 Bos. & Pul. 366. But in an action on an indemnity bond against a surety, the laches of the obligee is no ground of defence at law. Trent Navigation Company *v.* Harley, 10 East, 34.

Plaintiff

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Plaintiff nonsuited (*a*).

N. G. Clarke and ——— for the plaintiff.

Garrow for the defendant.

[Attornies, *Fisher* and *Rogers*.]

(*a*) *Vide* Ellis *v.* Galindo, Doug. 250. *n.* English *v.* Darley, 2 Bos. & Pul. 61. Ex parte Smith, Co. B. L. 168. Ed. 5. There is a good deal of contradiction and confusion in the books upon the question, which of the two, the drawer or acceptor of a bill of exchange, is to be considered the principal debtor, and which the surety. The old cases, looking to the consideration which passes from the payee to the drawer, treat the acceptor as a stranger, only collaterally liable; but in modern times the courts seem to be more influenced by the peculiar nature of the contract created by a bill of exchange; and as the drawer cannot be resorted to till the acceptor has made default, in analogical reasonings concerning their respective rights and liabilities, the latter is now generally pointed out as the principal and the former as the surety. *Q.* Whether it would now be held, that debt will not lie against the acceptor of a bill of exchange? Bishop *v.* Young, 2 Bos. & Pul. 78.

ADJOURNED SITTINGS AT WESTMINSTER.

1809.
Tuesday, June 27.

GIBBON *v.* COGGON, ESQ. Sheriff of Essex.

In an action against the drawer of a foreign bill of exchange, a promise of payment by the defendant after the bill was due, is sufficient evidence of a protest for non-payment, and notice of the dishonour of the bill.

THIS was an action against the sheriff of Essex for not arresting one *Joseph Colbourne* on mesne process at the plaintiff's suit.

The plaintiff's counsel opened, that *Colbourne* was liable to be held to bail as drawer of a foreign bill of exchange indorsed to the plaintiff.—To prove that *Colbourne*, who was an officer in the army, had received notice of the dishonour of the bill, the evidence was, that after it had become due, he was told it was dishonoured, and called upon to pay it; when he said, *that his affairs were at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agent were cleared.*

Park for the defendant contended, that the same evidence should be given here as in an action against *Colbourne*, and that to charge him as drawer of a foreign bill of exchange, a protest must be produced as the only regular notice of the bill's being dishonoured.

Lord

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GIBBON v. COGGON.

Lord ELLENBOROUGH.— By *Colbourne*'s promiſe to pay, he admits his liability; he admits the exiſtence of every thing which is neceſſary to render him liable. When called upon for payment of the bill, he ought to have objected, that there was no proteſt. Inſtead of that, he promiſes to pay it. I muſt, therefore, preſume that he had due notice, and that a proteſt was regularly drawn up by a notary (*a*).

It was then proved that after the delivery of the writ to the Sheriff, and until its return, *Colbourne* was in the county of Eſſex, and that notice of this fact had been given to Mr. *Cutting*, who is agent for the under-ſheriff in London.—But

In an action againſt the ſheriff for not arreſting a perſon on meſne proceſs, notice of this perſon being within the defendant's bailiwick, given to the under-ſheriff's agent in town, is no evidence of ſuch notice to the defendant.

Lord ELLENBOROUGH held that the plaintiff was bound to go farther, and prove notice to the under-ſheriff in the country, or to the bailiff to whom the warrant was directed. Mr. *Cutting* could not be conſidered the agent of the ſheriff for the purpoſe of receiving ſuch notice. His functions were of a perfectly different ſort. Suppoſe the caſe of a *capias* into Northumberland, could the under-ſheriff's agent in London have any concern with the manner of executing it? But the preſent caſe muſt be governed by the ſame rule.

(*a*) *Vide* Legge *v.* Thorpe, December 14, 1809, *poſtea*.

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GIBBON v. COGGON.

Plaintiff nonsuited.

Garrow and *Curwood* for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Duff* and *Cutting*.]

Tuesday, June 27.

TOWNSEND AND ANOTHER *v.* NEALE, ESQ.

Windsor Herald and *Blue Mantle Pursuivant at Arms* may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order for it was given, although only one of them was applied to by the defendant.

THIS was an action by *Windsor Herald* and *Blue Mantle Pursuivant at Arms*, for work and labour in making out the defendant's pedigree.

It appeared that the defendant applied only to Mr. Townsend, Windsor Herald; but that at the time when the application was made, both the plaintiffs were in attendance, and that by the usage of the Herald's Office, a Herald and Pursuivant are always in attendance, who share the profits of any business which is begun while they are jointly on duty, although it should not be finished till long after.

It was objected that the defendant could not be affected by any secret regulation among the members of the Herald's College, and that if liable at all, he could only be liable to the person with whom he had contracted.—But

Lord

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Lord ELLENBOROUGH held that the plaintiffs were in the ſituation of co-partners, and might maintain a joint action for money to which they were jointly entitled.

The defendant likewiſe objected that the pedigree was fabulous, which repreſented him as lineally deſcended from WILLIAM THE CONQUEROR, EDMUND IRONSIDE, LLEWELLIN, Prince of Wales, RODERICK, King of Ireland, FULKE, King of Jeruſalem, and CADWALLADER THE GREAT, King of Britain; beſides being allied to moſt of the reigning houſes now in Europe.

In ſuch an action the plaintiffs are bound to give general evidence of the pedigree being true, unleſs it has been dispenſed with by the defendant.

It was proved, however, that he had ordered his deſcent to be traced through all the direct and collateral branches; and that a ſketch of the pedigree, with references to the books in the office, had been delivered to him, which he did not object to, but refuſed to return. Several perſons from the Herald's Office ſwore that they never made out any fictitious pedigree, and that they had documents and proofs for all the 426 deſcents in the one in queſtion.

Lord ELLENBOROUGH ſaid, that as a fictitious pedigree could be of no uſe to the defendant, he would not be liable if this furniſhed to him were of that deſcription. In common caſes of this ſort, the plaintiffs would be bound to give ſome general evidence of the truth of the pedigree; but here a ſketch, with

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TOWNSEND and another v. NEALE.

references to the original documents, had been delivered to the defendant, with which he seemed satisfied, and by refusing to deliver it back, he had prevented the plaintiffs from verifying it. Upon the whole, the plaintiffs were entitled to recover, if the jury should believe that the pedigree was fairly compiled from authentic materials according to the laws of heraldry.

The plaintiffs had a verdict.

The *Attorney General* and *Scarlett* for the plaintiffs.

Garrow for the defendant.

[Attornies *Hanrott* and *Maddocks*.]

" *Temp. H.* 3. *fuerunt in Angliâ Reges heraldorum, Heraldi, et Perſuivandi. Reges toti Angliæ duo tantum, ab antiquo, —unus Auſtralium partium cis Trentam, alter Borealium trans Trentam. Hic* Norroy, *ille* Clarencieux *nominatus.* Garter *nullâ donatus provinciâ in primum locum ab H.* 5. *fuit ſuperinductus. R.* 3. 1. *Regni primus heraldos incorporavit.*" Spelm. Gloſs. Herald. But Philip & Mary, in the third year of their reign, granted a new charter to the College of Heralds, whereby, " Garter, *Rex Armorum*, Clarencieux, *Rex Armorum partium Auſtralium*, Norroy, *Rex Armorum partium Borealium*, 6 *heraldi inferiores*, Windſor, York, Cheſter, Richmond, Somerſet, Lancaſter, *et omnes proſecutores ſive perſuivandi armorum ſunt incorporati.*" 4 Inſt. 126. Com. Dig. tit. Norroy (A).

WOODFORD

1809.

Wednesday, June 28.

WOODFORD *v.* ASHLEY.

In an action for a malicious prosecution, an allegation in the declaration, that the person prosecured was acquitted by a jury *in the court of our lord the king, before the king himself at Westminster, before the Chief Justice*, is not supported by a record, from which it appears that the trial took place before the Chief Justice at *Nisi Prius*.

THIS was an action for a malicious prosecution. The declaration after stating that the defendant, on the 3d day of June 1808, indicted Mary, the plaintiff's wife, in the court of King's Bench, for an assault, alleged, that the defendant prosecuted the said indictment "until the said Mary afterwards, to wit, on "Wednesday next after 15 days of Easter, in the 49th "year of the reign, &c. in the court of our said Lord "the King, before the King himself at Westminster, "&c. before the Right Hon. Edward Lord Ellenbo- "rough, Chief Justice, &c. William Jones, Gent. "being associated with the said Edward Lord Ellen- "borough, according to the form of the statute, &c. "was in due manner and according to the due course "of law, by a jury of the said county of Middlesex "acquitted of the premises in the said indictment speci- "fied and charged upon her, and the said Mary was "discharged thereupon by the said court."

A copy of the record of acquittal was given in evidence, which was drawn up exactly in the usual form, and from which it appeared that the trial took place before Lord Ellenborough at Nisi Prius *on Tuesday next after the end of Hilary Term at Westminster in the county of Middlesex in the Great Hall of Pleas there*, and that on Wednesday next after 15 days of Easter (the return of the *habeas corpora*) the said Mary was adjudged by

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by the court of our lord the king before the king himſelf, *to depart without day in that behalf.*

The *Attorney-General* ſubmitted that there was a fatal variance between the declaration and the record of acquittal; as the trial was alleged to have taken place on Wedneſday next after 15 days from the feaſt day of Eaſter, whereas it was proved to have taken place on Tueſday after the end of Hilary Term; and there was a clear miſdeſcription of the tribunal before which the verdict of acquittal was given, the declaration ſtating that to have been "the court of our ſaid "lord the king before the king himſelf," (which muſt be a trial at bar) and the record proving it to have been in the great hall of pleas at Weſtminſter before Edward Lord Ellenborough, Chief Juſtice, &c. William Jones, Gent. being aſſociated, &c. (which was a trial at Niſi Prius.)

Garrow, for the plaintiff, maintained, that upon the authority of Purcel *v.* M'Namara, 9 Eaſt. 157. the variance as to time was immaterial; and the court at Niſi Prius, though not commonly ſo deſcribed, might without impropriety, be ſtiled the court of our lord the king before the king himſelf.

Lord ELLENBOROUGH.—This is not the court of our lord the king, before the king himſelf, but a ſitting at Niſi Prius in the great hall of pleas at Weſtminſter. What is deciſive is, that the declaration goes

goes on to say, that the said Mary was thereupon discharged by the *said* court. She was not both tried and finally discharged at the same time, nor by the same tribunal. The mistake has arisen from supposing that both occurrences took place together at the return of the *habeas corpora*. But the Chief Justice is then supposed to return his record, which shews that the trial took place at the day of Nisi Prius.—His Lordship refused to save the point, and directed a nonsuit.

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WOODFORD v. ASHLEY.

In the ensuing term *Puller* moved for a rule to shew cause why the nonsuit should not be set aside, contending that the variance was immaterial, and that as the declaration contained a sufficient averment of the acquittal according to the fact, the incongruous matter might be rejected as surplusage; but THE COURT held that there was a substantial misdescription of the tribunals before which the plaintiff's wife was tried and finally acquitted, and *Puller* took nothing by his motion.

Garrow, *Topping*, and *Puller*, for the plaintiff.

The *Attorney-General* for the defendant.

[Attornies, *Vincent* and *Johnson*.]

Vide Hunter v. French, Willes, 517. Rex v. Lookup, 1 T. R. 240, Morgan v. Hughes, 2 T. R. 231.

SABIN

1809.

Saturday, July 1.

SABIN *v.* DE BURGH and others.

A notice to magiſtrates under 24 G. 2. c. 44. need not ſpecify *the form of action* to be brought. It is ſufficient if it ſtates the writ or proceſs, and the *cauſe of action.*

THIS was an action for falſe impriſonment againſt three magiſtrates of the county of Middleſex.

A notice, of which the following is a copy, was proved to have been ſerved upon each of the defendants:

"Sirs,

YOU having on or about 17th day of October laſt, as three of His Majeſty's juſtices of the peace in and for the county of Middleſex, cauſed me to be apprehended and unlawfully confined in a certain gaol or priſon commonly called the Cage, at Uxbridge, in the ſaid county, and to be there impriſoned, and kept and detained in priſon there without any lawful, reaſonable, or probable cauſe whatſoever, for a long ſpace of time, (to wit,) for the ſpace of three hours then next following, and at the expiration of the ſaid confinement and impriſonment, cauſed and procured me to be removed from the ſaid Cage at Uxbridge, and unlawfully carried and conveyed hand-cuffed in and on board of a certain veſſel called the Enterprize Tender, then lying in the River Thames, and without any reaſonable or probable cauſe whatſoever, cauſed and procured me to be kept and confined in and on board of ſuch tender for a long ſpace of time, (to wit) for the ſpace of three weeks then next following; I do, therefore,

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therefore, according to the form of the ſtatute in ſuch caſe made and provided, hereby give you notice that I ſhall, at or ſoon after the expiration of one calendar month from the time of your being ſerved with this notice, cauſe a certain precept, commonly called a bill of Middleſex, to be ſued out of His Majeſty's court of King's Bench at Weſtminſter againſt you, at my ſuit, for the ſaid impriſonment, and ſhall proceed againſt you thereupon according to law. Dated this 28th day of December 1808.

Yours, &c.

Witneſs, &c. JAMES SABIN."

Garrow for the defendants objected, that this notice was inſufficient under ſtat. 24 G. 2. c. 44. (*a*), in not ſtating what action the plaintiff meant to found upon his bill of Middleſex. After ſuing out that, he might have declared in *caſe*, or in *treſpaſs*, and it was mate-

(*a*) Stat. 24 Geo. 2. c. 44. § 1. enacts, "that no writ ſhall be ſued out againſt, nor any copy of any proceſs at the ſuit of a ſubject ſhall be ſerved on any Juſtice of Peace, for any thing by him done in the execution of his office, until notice in writing of ſuch intended writ or proceſs ſhall have been delivered to him, or left at the uſual place of his abode, by the attorney or agent of the perſon who intends to ſue, at leaſt one calendar month before the ſuing out or ſerving the ſame, in which notice ſhall be clearly and explicitly contained *the cauſe of action*; on the back of which notice ſhall be indorſed the name of ſuch attorney, with the place of his abode."

rial

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rial that the magiſtrates ſhould be informed which was to be brought againſt them, as that might guide their diſcretion in tendering amends. One of the objections in Lovelace *v.* Curry, 7 T. R. 631. was, that the notice did not ſtate *what form of action the plaintiff meant to commence*, and it might be gathered from what fell from the court, that this objection was fatal.

Lord ELLENBOROUGH.—All that the ſtatute requires is, that the notice ſhall contain two things, 1. the writ or proceſs which the plaintiff intends to ſue out; 2. the cauſe of action for which he ſues. Both theſe are contained in the preſent notice. The form of action is not required to be ſpecified. In *Lovelace* v. *Carry*, the Court only decided, that there muſt be a month's notice of the particular proceſs to be ſued out, and that it was not enough to ſay, that an action ſhould be commenced againſt the magiſtrate *for his ſaid miſconduct*. I do not diſapprove of any thing laid down in that caſe; but I am not diſpoſed to carry it farther, leſt actions of this ſort ſhould be entirely defeated.

The attorney whoſe name was indorſed on this notice, and who had ſerved it, being aſked if at that time he had taken out his certificate, ſaid, he had ordered his clerk to take it out, and had given him money for this purpoſe; but that he had never ſeen it.—Lord *Ellenborough* held this ſufficient evidence of his being qualified to act as an attorney.

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It was proved that the defendants having convicted the plaintiff, a farmer's ſon, of riding on the ſhafts of his cart, whereby he forfeited 10*s.* ſent him on board the tender at the Tower, and that he was tranſmitted from thence to a ſhip of war at the Nore, where he remained till diſcharged under a writ of habeas corpus.

The plaintiff had a verdict with 500*l.* damages.

Park and *Reader* for the plaintiff.

Garrow, *Eſpinaſſe*, and *Arabin* for the defendants.

[Attornies, *Coleman* and *Wortham*.]

But the plaintiff cannot give notice of one form of action and declare in another. Strickland *v.* Ward, 7 T. R. 631. *n.* It is now ſettled, that where a magiſtrate intends to act as ſuch, in a matter within his juriſdiction, however miſtaken he may be, he is entitled to notice under this ſtatute. Weller *v.* Tokie, 9 Eaſt, 364. It is ſufficient for the attorney who gives the notice to deſcribe himſelf generally of the town in which he reſides, as "of Birmingham." Oſborn *v.* Gough. 3 Boſ. & Pul. 551. But it muſt appear from the words uſed, that the place at which the notice is dated is the place of the attorney's abode. "Given under my hand at D." held bad. Taylor *v.* Fenwick, 7 T. R. 635.

WRIGHT

1809.
Monday, July 3.

WRIGHT *v.* WARDLE, ESQ. M. P.

In an action for the value of goods furnished on the defendant's credit to a third person, that person is not a competent witness for the plaintiff, without a release

Q. If this person be a married woman living apart from her husband, whether *he* must be released to render *her* a competent witness?

THIS was an action by an upholsterer for the price of certain household furniture, supplied to one Mrs. Mary Anne Clarke, at the request and on the credit of the defendant.

To prove that the credit had been given to the defendant, the principal witness was Mrs. Clarke herself.

Best, Serjeant, for the defendant objected that she was not a competent witness without a release. As the goods were furnished to her, and were now her property, she was *primâ facie* liable for them, and she had therefore a direct interest to fix that liability on another person.

The *Attorney General*, *contra*, contended, that she was quite an indifferent witness; since the plaintiff, by bringing his action against Mr. *Wardle*, disclaimed all right to sue her, in the same manner as if he had formally released her.

Lord ELLENBOROUGH was at first inclined to think that the witness could never be charged for these goods, and had no interest in the verdict; but afterwards thought a release was necessary, as she might have misled the plaintiff by misrepresenting the conduct of the defendant, and might still be liable if this were detected.

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WRIGHT v. WARDLE.

A releaſe was accordingly executed to her, by the name of *Mary Anne Clarke*. She was then aſked, whether ſhe was not married? She ſaid that ſhe was; but that ſhe had long lived apart from her huſband.

Beſt, Serjeant, inſiſted that the releaſe ſhould be executed to him.

The *Attorney General* argued, that if ſhe was a married woman ſhe had no intereſt whatever, as ſhe could not herſelf be ſued for the goods even had credit been given to her alone; and that her huſband could not be liable for articles furniſhed to her in the ſituation in which ſhe then lived.

Beſt, Serjeant, anſwered, that a married woman was an incompetent witneſs in a queſtion in which her huſband was intereſted; that for any thing proved, theſe goods might be ſuitable to the fortune and degree of Mrs. Clarke's huſband; and that the Judge would not try in this incidental manner, whether ſhe had done or was doing any thing to diſcharge her huſband from all liability for the debts which ſhe contracted.

The *Attorney General* ſaid, the plaintiff was ready to execute a releaſe to the huſband,—which was done accordingly.

Mrs. Clarke then proceeded with her evidence, and the plaintiff had a verdict.

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WARDLE.

The *Attorney General*, *Garrow*, and *G. Beſt* for the plaintiff.

Beſt, Serjeant, *Park* and *Marryat* for the defendant.

[Attornies, *Stokes* and *Corfield*.]

If huſband and wife are not parties on the record, it does not ſeem perfectly ſettled, in what caſes the one may be a witneſs where the intereſts of the other are at ſtake. In Williams *v.* Johnſon, 1 Str. 504, which was an action for wedding clothes furniſhed to the defendant's wife, the mother-in-law was admitted to prove that they were delivered on the credit of *her* huſband, and thereby to charge him. But in Davies *v.* Dinwiddy, 4 T. R. 678, where the action was brought by the truſtees of a married woman for taking, under an execution againſt the huſband, goods ſecured to the ſole and ſeparate uſe of the wife, the huſband was held not to be a competent witneſs to prove the identity of the goods, although it was argued that he came to ſpeak againſt his intereſt, as if the goods were not rightfully taken in execution, the debt remained unſatisfied.—Wherever the huſband or wife is a party, the evidence of the other is invariably excluded on grounds of *policy*, whatever the tendency of the evidence tendered may be on the ſcore of *intereſt*. Vide Broughton *v.* Harper, 2 Lord Raym. 752. Rex *v.* Cliveger, 2 T. R. 263. Bentley *v.* Cook, 2 T. R. 265.

ADJOURNED SITTINGS IN LONDON.

WRIGHT *v.* DANNAH.

Tuesday, July 4.

GOODS bargained and sold.—Plea, the general issue.

A memorandum of the sale of goods under the 17th section of the statute of frauds, cannot be signed by one of the contracting parties as the authorized agent of the other: the agent must be a third person.

The action was brought for the value of four sacks of clover seed. The parties having met on the corn exchange in London, entered into a negociation for the sale of this seed; and after they had agreed on the price, the plaintiff wrote the following memorandum of the contract.

"Robert Dannah, Windley near Derby.

4 Sacks clover seed, at 6l. 18s.
Per Fly Boat."

After the plaintiff had written this memorandum, the defendant, who overlooked him while he wrote it, desired him to alter the figures 18 to 16,—*6l. 16s.* being the price agreed on. This the plaintiff accordingly did. They then parted, the memorandum being left with the defendant.

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WRIGHT v. DANNAH.

Park objected that this was not a ſufficient memorandum within the ſtatute of frauds, not being ſigned by the party to be charged by it, or his authorized agent (*a*).

Garrow and *Puller*, *contra*, ſubmitted that the defendant had made the plaintiff his agent for the purpoſe of ſigning the memorandum, by overlooking and approving of what he had written; and they put the caſe of a man incapable from diſeaſe or ignorance of writing for himſelf.

Lord ELLENBOROUGH ſaid, the agent muſt be ſome third perſon, and could not be the other contracting party.

Plaintiff nonſuited.

Garrow and *Puller* for the plaintiff.

Park for the defendant.

[Attornies, *Wild* and *Bleaſdale*.]

(*a*) 29 Car. 2. c. 3. ſ. 17, enacts, "that no contract for the ſale of any goods, &c. for the price of 10l. or upwards, ſhall be good except, &c. or that ſome note or memorandum in writing of the ſaid bargain, be made and ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully authorized."

This

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This case will probably be considered as governing the construction of the 4th section, concerning promises by executors, sureties, &c. in which the words as to the *agent* are nearly the same as in the 17th.—The 3d section, relating to assignments and surrenders of leases, &c. requires that the agent shall be authorized *by writing*.

LEEDS AND OTHERS *v.* LANCASHIRE.

Tuesday, July 4.

THE plaintiffs declared as payees of a promissory note made by the defendant for 200l. The first count stated the note as payable on request; the second as payable six months after date.

The instrument adduced in evidence, was in the following form:

"We jointly and severally promise to pay to Mr. Thomas Leeds and Co. (the plaintiffs) or order, the sum of 200l. for value received by us. As witness our hands this 8th day of Sept. 1808.

Jas. Marriott.
Jas. Lancashire.
Edward Ball."

Upon an instrument in the common form of a joint and several promissory note, signed by three persons, there is an indorsement written at the time of signing it, stating that the note is taken as a security for all balances to the amount of the sum within specified which one of the three might happen to owe to the payee; that the note should be in force six months; and that no money should be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare upon this instrument as a promissory note, payable either on demand, or at six months after date. Between these parties, the instrument is an *agreement*, and must be stamped and declared upon as such.

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LEEDS and others v. LANCASHIRE

On the back of the paper were theſe words, which were proved to have been written before it was ſigned by *Lancaſhire* or *Ball:*

"The within note is taken for ſecurity of all ſuch "balances as James Marriott may happen to owe to "Thomas Leeds and Co. not extending further than "the within named ſum of 200l.; but this note to "be in force for ſix months, and no money liable to "be called for ſooner in any caſe."

It appeared that there were mercantile dealings between the plaintiffs and Marriott, in the courſe of which he became indebted to them; and that they refuſed to deal with him any longer, unleſs he procured a guarantie from ſome reſponſible perſons. Upon this, the above inſtrument was made. It was impreſſed with a promiſſory-note ſtamp, and the makers repreſented it to the plaintiffs as a binding promiſſory note.

Garrow for the defendant objected, however, that it was in reality *an agreement*, and ought to have been ſtamped and declared upon accordingly.

Park and *Littledale* contended, that this inſtrument muſt either be conſidered a promiſſory note payable on demand, or a promiſſory note payable in ſix months. It was made payable to the plaintiffs *or order*, and therefore was negotiable. Might it not then have been declared on as a promiſſory note in the hands of an in-

dorſee for value? But it muſt be ſo equally in the hands of the payees. The indorſement being repugnant to the body of the bill, might be rejected entirely; and if it were conſtrued as a defeazance, it could not operate further than to prevent the bill from being put in ſuit till ſix months after its date, and to let in evidence on the part of the defendant that no balance was then due to the plaintiffs from *James Marriott*.

Lord ELLENBOROUGH.—As between theſe parties, the inſtrument in queſtion is only an agreement, and not a promiſſory note. In the hands of a *bona fide* holder, who received it as a promiſſory note, it might poſſibly be conſidered as ſuch; but the preſent plaintiffs can only treat it as a guarantie for *Marriott* to the amount of 200l. As to them, the indorſement muſt be incorporated with the body of the note. It is clear, therefore, that they cannot maintain an action upon it without an agreement ſtamp.

Plaintiffs nonſuited.

Park and *Littledale* for the plaintiffs.

Garrow for the defendant.

[Attornies, *Ellis* and *Blakelock*.]

It was formerly thought a promiſſory note might in ſome caſes be payable on a contingency. Andrews v. Franklin, Stra. 24. Dawkes v. Lord Deloraine, 2 Bl. Rep. 784. But it

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it is now fully settled that there is no distinction in this respect between promissory notes and bills of exchange, and that if the money is not payable at all events, the instrument must be treated as a special agreement. Carlos v. Fancourt, in error, 5 T. R. 482.

Thursday, July 6.

SMITH v. MULLETT.

* In an action by the *fourth* against the *first* indorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the two-penny post office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d. *Held*, that by this laches the plaintiff had discharged all the prior indorsers, although in the course of the 22d, notice of the dishonour was given both to the *second* indorsee and to the defendant.

ACTION against the indorser of a bill of exchange drawn by one *Mills*, payable to his own order, and indorsed by him to the defendant, by the defendant to one *Hefford*, by *Hefford* to one *Aylett*, by *Aylett* to the plaintiff, and by the plaintiff to one *Lowe*.

The bill became due on Saturday, May 19th, when it was in *Lowe*'s hands. He and all the parties to it reside in the metropolis. On Monday the 20th, *Lowe* gave notice to the plaintiff that the bill had been dishonoured. On Tuesday afternoon, a few minutes past five, the plaintiff's clerk put a letter into the two-penny post office, giving notice to *Aylett*. This letter having been put in so late, according to the course of the two-penny post, was not delivered out till Wednesday morning. On Wednesday *Aylett* gave notice to *Hefford*, and *Hefford* to the defendant. The question was, whether the defendant had received due notice of the dishonour of the bill.

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Park and *Coltman* maintained that the notice was sufficient on the authority of Scott v. Lifford, 1 Campb. 246. where a bill of exchange, all the parties to which resided in London or the vicinity, becoming due on the 4th of the month, it was then presented for payment by the payee's bankers, who returned it to him dishonoured on the 5th, and the court held that a letter from him, put into the two-penny post on the 6th (at what hour did not appear), was reasonable notice to the drawer of the dishonour of the bill. The rule therefore was, that every indorsee should have a day to give notice to his indorser; and here reckoning the number of indorsees, it would be found that the defendant had received notice a day sooner than he had a right to require it.

Lord ELLENBOROUGH.—It is of great importance that there should be an established rule upon this subject, and I think there can be none more convenient than that where the parties reside in London, each party should have a day to give notice. I have before said, the holder of a bill of exchange is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. It is enough if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time.—But here *a day has been lost*. The plaintiff had notice himself on the Monday, and does not give notice to his indorser till the Wednesday. If a party has

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an entire day, he must send off his letter conveying the notice, within post time of that day. The plaintiff only *wrote* the letter to *Aylett* on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night, as lie at the post office. He has clearly been guilty of laches, by which the defendant is discharged.

Plaintiff nonsuited.

Park and *Coltman* for the plaintiff.

Garrow and *Comyn* for the defendant.

[Attornies, *Wasbrough* and *Creak*.]

In *Marsh* v. *Maxwell*, tried during the same sittings, Lord ELLENBOROUGH ruled, that upon the dishonour of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shewn that each indorsee gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorsers are discharged.

PIERSON *v.* HUTCHINSON.

Friday, July 7.

THIS was an action by the indorſee againſt the acceptor of a bill of exchange.

An action at law cannot be maintained againſt the acceptor of a bill of exchange, which was loſt, after being indorſed, although a bond of indemnity has been tendered to the defendant.

The *Attorney-General* in opening the plaintiff's caſe ſtated, that he ſhould not be able to produce the bill, as it had been loſt; but he ſhould prove that before the action was brought, the defendant had been regularly called upon for payment, and had been offered an unexceptionable indemnity. According to the uſage of merchants, he was thereupon bound to honour his acceptance in the ſame manner as if the bill had ſtill remained in the plaintiff's hands, and had been actually preſented to him in the uſual form. It is laid down by *Marius* (*a*), that when an accepted bill is loſt, the party to whom it is payable ſhould notify this to the acceptor; "and when the bill falls due, and the time is come "for him to go for the money, the party which had "accepted the bill is not freed from preſent payment of "the money, becauſe the bill is loſt; for though the "accepted bill be loſt, yet he that accepted it is not: "Neither muſt the acceptor think this to be a ſufficient "anſwer for him to ſay, *ſhew me my accepted bill and* "*I will pay you*, and ſuch like flams, merely to make "uſe of the money a little longer time. He may, in "caſe of obſtinacy, be ſued at law for the money with-

(*a*) Marius on Bills of Exchange, p. 19. fol. ed.

"out

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"out the accepted bill, and be forced to the payment "thereof with coſts and damages; and therefore merely "by reaſon of the loſs of the accepted bill, he can have "no juſt cauſe or plea to detain the money beyond the "juſt time from the right party who ſhould receive the "ſame." *Marius* then goes on to ſay, that for this purpoſe the party entitled to payment has only to give bond or other reaſonable writing to the content and good liking of the party that did accept the bill, and ſuch as in reaſon he cannot refuſe, engaging to ſave him harmleſs from the accepted bill which is loſt, and to diſcharge him from the ſum therein mentioned againſt the drawer and all others in due form.—Therefore, if it ſhould appear in the preſent caſe, that the indemnity offered was ſuch as in reaſon the defendant could not refuſe, the production of the bill would be diſpenſed with, and the acceptance being proved by ſecondary evidence, the plaintiff would be entitled to a verdict.

Lord ELLENBOROUGH.—If the bill were proved to be deſtroyed, I ſhould feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the deſtruction of the inſtrument charged by the indictment to be forged, is no bar to the proceedings. I remember a caſe before Mr. Juſtice BULLER, where the priſoner had deſtroyed a bank note he was accuſed of having forged, by ſwallowing it. He was acquitted on the merits: but the learned judge who preſided held, that he might have been convicted without the production of the bank note, and this doctrine was approved of by the whole profeſſion. Here, however, the

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the inſtrument is not deſtroyed. It is loſt after being indorſed by the payee. It may now be in the hands of a bonâ fide indorſee for value, who might maintain an action upon it againſt the defendant. This brings it to the indemnity. But whether an indemnity be ſufficient or inſufficient, is a queſtion of which a court of law cannot judge. There are *dicta* to be ſure, that upon the offer of an indemnity the indorſee of a loſt bill may recover at law; but theſe are ſo contrary to the principles on which our judicial ſyſtem reſts, that I cannot venture to proceed upon them. Since the plaintiff can neither produce the bill nor prove that it is deſtroyed, he muſt reſort to a court of equity for relief.

The *Attorney-General* ſaid they could ſhew that the bill had been diſcounted for the defendant's accommodation, and that the money had come into his hands; but Lord ELLENBOROUGH obſerved, that would not alter the caſe; for if the plaintiff were allowed to recover on the money counts, the defendant might ſtill be compelled to pay the ſame ſum a ſecond time to a bona fide holder of the bill.

Plaintiff nonſuited.

The *Attorney-General, Holroyd*, and *Bolland* for the plaintiff.

Garrow for the defendant.

[Attornies, *Smith* and *Sherwood*.]

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In Hart v. King, 12 Mod. 310, which was an action againſt the drawer of a bill of exchange which had been loſt after it was proteſted, Lord Holt is ſtated to have ruled, that the plaintiff was intitled to recover, on proving an acknowledgment by the defendant that he had drawn the bill. But from the report it does not appear in what character the plaintiff ſued, and as there is no mention of any indemnity, it is probable that the bill had never been indorſed.

In *Ex parte Greenway*, 6 Veſ. Jun. 812. Lord ELDON, C. ſaid, "When I was Chief Juſtice, I tried an action in the Common Pleas upon a bill alleged to be loſt, which had been previouſly indorſed by the payee. An indemnity was offered by bond: but I nonſuited the plaintiff. The counſel objected ſtrongly on the offer of indemnity. But I never could underſtand by what authority courts of law compelled parties to take the indemnity."

If the bill when loſt was not indorſed, and conſequently no good title can be made to it, there ſeems no reaſon why an action at law may not be maintained upon it, as in the caſe of a loſt deed.—And it has been determined that if a bill when loſt had only a ſpecial indorſement upon it, the indorſee may recover at law without producing the bill.

Long and others v. *Baillie*, Guildhall, 13th December 1805. Cor. Lord ELLENBOROUGH.

Action againſt the Defendant as acceptor of a foreign bill of exchange, drawn by one Alvez payable to his own order, and ſpecially indorſed by him to the plaintiffs.—*Lucas*, clerk to *Winter and Kaye*, proved that he carried the original bill to the Temple to enable one *Jones* to compare it with the affidavit to hold to bail, and having done ſo, and taken a correct copy of it, put it into his pocket book, which was ſtolen on his return home. *Jones* proved that the copy produced was correct, and that *Alvez*, the drawer, had indorſed it ſpecially to the plaintiffs. On this evidence the plaintiffs had a verdict.

Another diſtinction may perhaps be taken, with reſpect to a bill indorſed in blank, and loſt *after it has become due*. As the finder could not in that caſe give an effectual right of action even to an indorſee for value and without notice, it may be thought that the acceptor cannot inſiſt upon an indemnity, and that the interference of a court of equity would be unneceſſary; but as the plaintiff would make out a

might

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prima facie caſe by proving the acceptance and indorſement, it might be hard to expoſe the acceptor, after payment of the bill without any indemnity, to the hazard of ſhewing by legal evidence, that the bill had been loſt after it became due.

It ſeems extraordinary that the proviſion of 9 & 10 W. 3. c. 17. § 3. concerning the giving of another bill of exchange in the place of one loſt, ſhould never have been extended by the legiſlature beyond the caſe of the drawer of an inland bill,—above the value of 5 l.—payable at a certain time after date—expreſſed to be for value received—and loſt within the time limited for payment.—The 3 & 4 Ann. c. 9. having given the like remedies on notes as were then in uſe on inland bills, may be conſidered as having extended it to the makers of promiſſory notes of a like deſcription.

As to the mode of proceeding to enforce payment of a loſt bill in equity, vide 1 Veſ. 341. 5 Veſ. Jun. 338. 6 Veſ. Jun. 812.

MINES *v.* SCULTHORPE.

Saturday, July 8.

INDEBITATUS aſſumpſit for goods bargained and ſold; and for goods ſold to defendant, and, at his requeſt, delivered to one *Cecil Hicks*; with the uſual money counts. Plea, the general Iſſue.

If *B.* by a written guarantie undertake to *A.* to *anſwer for the payment of goods* to be ſent by him to *C.*, *A.* cannot maintain *indebitatus aſſumpſit* againſt *B.* for the price of goods ſent to *C.* accordingly, but muſt declare ſpecially on the guarantie.

Hicks, a retail ſhopkeeper, applied to the plaintiff, a wholeſale dealer, to be furniſhed with a quantity of cheeſe in the way of his trade, and referred him to the defendant as a perſon who would be accountable for what ſhould be ſent. The plaintiff thereupon wrote a letter to the defendant, requiring to know whether he conſented to this. The defendant returned the following anſwer:

"Sir,

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" Sir,

IN reply to yours of yesterday respecting Mr. Hicks, now inform you, I will answer for the payment of goods sent to him to the amount of £100. for six months. Hope, after that, you will not think it necessary for me to be longer accountable, as you will, of course, become well acquainted with his manner of doing business, and that that, as well as his payments, will be quite satisfactory. I am, &c."

Goods were accordingly supplied by the plaintiff to *Hicks*, for the value of which the present action was brought.

Garrow and *Lawes* for the defendant contended, that under these circumstances *indebitatus assumpsit* would not lie, and the plaintiff ought to have declared specially upon the guarantie. The goods were not sold to the defendant; but to *Hicks*. He was the real debtor, and the other was only a surety. There was no debt or duty, therefore, on the part of the defendant, in consideration of which the law raised a promise. The declaration should have stated, that in consideration that the plaintiff would deliver the goods to *Hicks*, the defendant undertook to guarantee the payment of them.

The *Attorney-General, contra*, argued, that as the defendant had undertaken to *answer for the payment of goods sent*, there was a contract of sale with him, and the price of the goods so sent was a *debt* for which he

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was liable, and for the payment of which the law raised a promise. According to the contract between the parties, the consideration moving from the plaintiff was executed, and the breach of the defendant's undertaking lay in the non-payment of money. Therefore, *indebitatus assumpsit* was the proper remedy.

Lord ELLENBOROUGH. The goods were certainly sold to *Hicks*. The defendant's undertaking is collateral, and ought to have been declared on specially.

Plaintiff nonsuited.

The *Attorney General* and *Marryat* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Wharton* and *Langham*.]

See all the cases upon this subject, collected and commented upon, 1 Williams's Saunders, 211. (2.)

Monday, July 10.

SNOOK AND ANOTHER *v.* DAVIDSON AND ANOTHER.

A., a merchant, at different times employs *C.*, an insurance broker, to effect policies of insurance for him: *C.*, without *A.*'s concurrence, employs *B.*, another insurance broker, to effect these policies, informing him that they were for a correspondent in the country: *B.* gets the policies effected in *A.*'s name, and delivers them all, except one, to *C.*; *C.* becomes bankrupt, without having paid *B.* any part of the premiums, and *A.* being indebted to his estate beyond the amount.—*Held*, that *B.* had not a lien on the policy he detained for the general balance due to him from *C.*, and that *A.* could maintain trover for this policy against *B.*, after tendering him the premiums and commission due in respect of it alone.

TROVER for a policy of insurance.

The question was, whether the defendants had a lien upon this policy for the general balance due to them from one *John Carter?*

In December 1808 and January 1809, the plaintiffs gave instructions to *Carter*, an insurance broker, to effect several policies for them. *Carter*, instead of doing so himself, without their consent or knowledge, employed the defendants, who are likewise insurance brokers, to effect the policies. He told the defendants, they were for a correspondent in the country, and it appeared from the policies themselves, which he delivered to them, that they were for the plaintiffs, as they were all filled up in their names. The defendants got the policies underwritten, and advanced the premiums; no part of which has yet been repaid to them. All the policies were delivered to *Carter*, except that on which the action was brought.

In January 1809, *Carter* was declared a bankrupt. The plaintiffs were then indebted to him in a larger sum than the balance due from him to the defendants.

Before

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Before the commencement of the action, the plaintiffs tendered the defendants 171. 6s. 6d. the amount of premiums and commiſſion on the policy in queſtion; but the defendants refuſed to deliver it up, unleſs the balance due to them from *Carter* were completely ſatisfied.

Park for the plaintiffs contended, on the authority of Maanſs *v.* Henderſon, 1 Eaſt. 335, that the defendants could have no lien on the policy for their general balance. The principle laid down in that caſe was, that wherever the broker has notice that the perſon who employs him is himſelf an agent, the rights of the principal ſhall not be affected by the ſtate of accounts between the other two; and it was there held that an Engliſh ſubject, in time of war, informing the broker that the property inſured was *neutral*, was a ſufficient indication to the broker that the party acted as *agent* and not on his own account. Here *Carter* expreſsly told the defendants that theſe policies were for a correſpondent in the country, and the plaintiffs' names actually appeared upon the face of them.

Garrow, contra, inſiſted that the caſe of *Maanſs* v. *Henderſon* differed eſſentially from the preſent. Here it appeared that the aſſured had not paid the premiums to any one, and they could ſuffer no inconvenience if called upon, while theſe premiums were ſtill due to ſome one, to pay them to thoſe by whom they had actually been diſburſed. *Carter* might be preſumed to have an authority to effect the policies through the medium of another broker, if he could not do the

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buſineſs himſelf. The plaintiffs having enjoyed the benefit of the labour and money of the defendants, were bound to pay them what was due upon all the policies, and if they paid this to the defendants, it was clear they could not be again liable to the aſſignees of *Carter*, which was the proper rule for deciding the queſtion.

Lord ELLENBOROUGH.—There is no privity between you and this party. A ſub-agent employed as the defendants were, cannot acquire the broker's general lien.

Verdict for the plaintiffs.

Park and *Abbott* for the plaintiffs.

Garrow and *Gaſelee* for the defendants.

[Attornies, *Wood* and *Atcheſon*.]

According to the principle of George v. Claggett, 7 T. R. 359. if the agent acts under a *del credere* commiſſion, and directs policies to be effected as for himſelf, the broker would be entitled to retain the policy in his hands, or any money received from the underwriters upon it, for the general balance as between him and the agent. Where the agent has not a *del credere* commiſſion, it does not ſeem expreſsly determined, how far he can give the inſurance broker a general lien, by concealing his principal; but reaſoning from analogy, it may be concluded, that without ſome ſpecial authority, the agent cannot convert the policy into a pledge or ſecurity for a debt due from himſelf to a third perſon. *Vide* Grove v. Dubois, 1 T. R. 112. Daubigny v. Duval, 5 T. R. 604. Mackenzie v. Scott, 6 Bro. P. C. 280.

PARKIN

PARKIN *v.* DICK.

Tuesday, July 11.

Policy from London to a foreign port, "on goods as ſhould thereafter be declared, each package to pay average, the ſame as if it were ſeparately inſured." A ſmall quantity of *naval ſtores* was afterwards mentioned in the ſpecification of intereſt, and exported in the veſſel with the other goods inſured, without a licence, contrary to a proclamation authorized by 33 G. 3. c. 2. Held, that the policy was entirely vitiated, and that the aſſured could not recover for that part of the goods the exportation of which was legal.

THIS was an action on a policy of inſurance at and from London to the ſhip's port or ports of diſcharge in the Brazils. By a memorandum at the bottom of the policy, the inſurance was declared to be on goods by the *Little Jean*, as ſhould thereafter be declared, *each package to pay average the ſame as if it were ſeparately inſured.*

In the ſpecification of intereſt on the back of the policy were the following articles; 9 *anchors*, 22 *grapnells*, 7 *cables*, 20 *coils of cordage.*

The ſhip was captured on her outward voyage by a ſquadron of French frigates.

The *Attorney General* for the defendant contended, that the inſurance was illegal and void. By 33 G. 3. c. 2. his Majeſty was authorized to prohibit the exportation of all naval ſtores without a licence; and by an Order in Council, dated 22 December 1807, ſuch exportation was prohibited for a period comprehending the voyage in queſtion. Therefore as it could hardly be contended that *anchors* and *cables* were not *naval ſtores*, unleſs the plaintiff could produce the king's licence for exporting them, he muſt be nonſuited.

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Garrow, contra, inſiſted that even ſuppoſing the act of parliament to have been violated, however the exporter of theſe articles might be liable to a penalty, the policy was not avoided, as the act contained no clauſe (ſuch as was inſerted in the convoy and ſlave-trade acts) to prohibit or annul inſurances on voyages undertaken contrary to its enactments.—At any rate, this could only be a queſtion of *quantum*. The articles which came under the denomination of *naval ſtores* formed but a very trifling part of the cargo; and it was expreſsly provided by the policy, that each package ſhould pay average, the ſame as if it were ſeparately inſured. The inſurance, therefore, was clearly good for all but the prohibited articles. In the late caſe of Law *v.* Hodgſon (*a*) upon the ſale of bricks, Mr. Juſtice LE BLANC aſked if *all* the bricks were under the ſtatute meaſure; thereby clearly ſignifying, that for ſo many as were not, the plaintiff might have recovered. If there were different ſhippers of goods on board a general ſhip who protected their reſpective intereſts by ſeveral policies, all theſe policies could not be rendered void by one of them being upon naval ſtores. So here it muſt be taken as if there were ſeparate policies upon each package; and, with the exception of a few articles, the aſſured were entitled to their ſtipulated indemnity from the underwriters.

Lord ELLENBOROUGH.—The objection is fatal. I have got a clauſe declaring policies on prohibited

(*a*) Ante 147.

voyages,

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voyages, introduced into acts of parliament, for the purpose of warning the public. But it is clearly unnecessary. The illegality of such policies is a consequence of law. Nor can I separate one part of the subject matter insured from the residue. It may be a hard case if only a small quantity of naval stores be included in a cargo which is insured; but the smallest quantity renders the adventure illegal, and I have no scales to weigh degrees of illegality. This contract is entire, and is wholly void.

Plaintiff nonsuited.

In the ensuing term, *Taddy* moved for a rule to shew cause why the nonsuit should not be set aside; arguing, that the insurance was valid as to all the goods, except the naval stores, which constituted but a very small part of the cargo; that the case was like that of a bond conditioned for the performance of some covenants that were legal and some that were illegal, where the obligee may still sue for the penalty upon the breach of any of the legal covenants; that the legislature, by enacting that the shipper should forfeit treble the value of the naval stores exported, affixed a specific penalty to a violation of the act, but did not avoid all policies upon the voyage; that if a policy upon a large cargo of lawful goods were to be vitiated because a small quantity of naval stores was put on board, a penalty might be inflicted infinitely greater than the legislature intended; and that in the present case the defendant was estopped from taking the objection, as

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the policy informed him of the nature of the goods. But—

The COURT said, it being rendered illegal by the act to sail with any quantity of naval stores on board, without a licence, all collateral contracts were impliedly forbidden, and vacated if entered into; that the policy could not be applied to the other goods, the voyage being unlawful and the contract entire; that the hardship was not a greater than in the case of smuggling; that the underwriters did not know what the goods were when they underwrote the policy, and if they did, might have presumed that the plaintiff had obtained a licence; that the ship was liable to be stopped on account of the naval stores on board, whereby the risk was greatly enhanced; that the assured had broken an implied warranty, not to put any thing on board the ship which should render her liable to be seized or detained; and that to allow the question to be further discussed might occasion doubts upon points of law which it was of importance that the public should consider as finally settled.

Rule refused.

Garrow, *Topping*, and *Taddy* for the plaintiff.

The *Attorney General*, *Garrow*, and *Marryat* for the defendant.

[Attornies, *Palmer & Tomlinson*, and *Blunt & Bowman*.]

(*a*) Vide Johnson v. Hudson, 11 East. 180. Gremare v. Valon, ante 144.

STIRLING

STIRLING, BART. v. VAUGHAN.

Thurſday, July 13.

THIS was an action on a policy of inſurance effected by the plaintiff, "for himſelf and others concerned or as agent, on the prize No. 3, (the Princeſſa) at and from Monte Video to a port or ports of diſcharge in the United Kingdom, valued at 6000l. as per W. B.'s letter of the 10th September." The firſt count ſtated the intereſt to be in the KING, and that the inſurance was made for his uſe and benefit. The ſecond count laid the intereſt to be in "the flag and general officers and commanders, and other officers, ſeamen, marines, and ſoldiers, acting on a conjunct expedition of the navy and army, (amongſt others) againſt a certain fortreſs upon the land, to wit, the fortreſs of *Monte Video*." A third count alleged that the *Princeſſa* was *not a ſhip belonging to his Majeſty, or any of his ſubjects*. The loſs was averred in all to have happened by the perils of the ſea.

The captors of property in a conjunct expedition by the navy and army, againſt a fortreſs on the land, ſince 45 G. 3. c. 72. have an inſurable intereſt before condemnation.

The *Princeſſa* was a prize captured at *Monte Video*, when that place was taken by the expedition under General Sir *Samuel Auchmuty* and Rear Admiral *Stirling*. The inſurance was effected in conſequence of a letter received by the plaintiff from *William Blacker*, and ſigned by him for himſelf and the other prize agents appointed by the commanders of the expedition to act on behalf of all intereſted in the capture.

On

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On the 10th of Sept. 1807, the *Princeſſa*, having been fitted up as a tranſport, ſailed from the river *Plate*, with the fleet for *England*, under the command of Admiral *Murray*. She experienced ſtormy weather, and on the 23d of the month ſhe was obliged to make ſignals of diſtreſs. Admiral *Murray* ſent perſons on board to examine her condition, and upon their report he withdrew the troops ſhe carried, together with her crew, to other veſſels, and abandoned her and her cargo upon the ocean. She was never ſeen or heard of afterwards.

Park inſiſted that the plaintiff could not recover, as the inſurance had not been effected by order of any one who had an inſurable intereſt in the prize. According to *Lucena* v. *Crawford* (*a*), there was ſuch an intereſt in the crown; but ſtill it was neceſſary that the inſurance ſhould be effected by ſome one authothorized by his Majeſty. In that caſe, Mr. *Roſe* had proved that the Dutch prizes were inſured by an order from the Treaſury. Perhaps it would be enough if the inſurance were recognized and adopted by his Majeſty's government; but here there was no evidence of that ſort; *Blacker* was merely the agent of the captors, and the action was evidently brought for their benefit. The queſtion, therefore, was reduced to this, whether they had an inſurable intereſt at the time when the policy was effected? and it was clear that

(*a*) 3 Boſ. & Pul. 75. 2 New Rep. 269.

they

they had not before condemnation, which did not take place till long after. Previous to that they had only a remote hope of advantage, which might eaſily have been defeated.

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Lord ELLENBOROUGH.—By 45 Geo. 3. c. 72. it is enacted, that in conjunct expeditions of the navy and army againſt any fortreſs upon the land, property taken thereat ſhall be divided among the flag and general officers, other officers, ſeamen, and ſoldiers employed, in ſuch proportions as his Majeſty ſhall fix, or the commanders ſhall agree upon. The captors of the property taken at *Monte Video*, therefore, had an inſurable intereſt in it from the moment of the capture. Antecedently to the paſſing of that ſtatute, the navy had an inſurable intereſt in prizes taken at ſea before condemnation (*a*); and the navy and army acting in a joint expedition againſt a land fortreſs, are now placed on the ſame footing. The plaintiff might poſſibly recover on the count which lays the intereſt in his Majeſty. It is the duty of every ſubject to protect the property of the crown; and an inſurance effected by order of the agent appointed by the commanders of his Majeſty's forces, may perhaps be preſumed to be authorized by the crown. But on the ſecond count there can be no doubt. A reaſonable expectation of profit has been held to be an inſurable intereſt; and here the right of the captors could only be defeated by the crown re-

(*a*) Le Cras v. Hughes, Park, 358, 6th edition, Marſhall, 108. Boehm v. Bell, 8 T. R. 154.

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ſtoring the property taken to the enemy. The captors had the poſſeſſion of the ſubject matter inſured, and a well founded expectation of the whole being diſtributed among them. Therefore, a policy to protect their intereſt in it, is not a mere wager, but muſt be conſidered a fair and valid contract of indemnity.

Verdict for the plaintiff.

The caſe afterwards came before the Court, on a rule to ſhew cauſe why there ſhould not be a new trial; when the Judges, without giving any opinion on the queſtion, how far the inſurance could be conſidered as effected on account of his Majeſty, all agreed that the captors had an inſurable intereſt before condemnation, and that the verdict ought clearly to ſtand on the ſecond count (*a*).

The ſentence of the Court of Admiralty condemning certain goods as captured from the enemy, is concluſive evidence that they were ſo captured.

Another action was tried on a policy *on goods* on board the ſame ſhip. The cargo conſiſted chiefly of

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(*a*) But where a ſhip is taken by an Engliſh cruizer, after a proclamation by the king to detain and bring into port all veſſels of the nation to which ſhe belongs, and *before a declaration of hoſtilities* againſt that nation, the captors have not upon the commencement of hoſtilities an inſurable intereſt in the prize, as they cannot claim it of right, and if the crown make a grant in their favour of the whole or any part of it, this would be altogether *ex gratiâ*. Routh v. Thompſon, 11 Eaſt 428. If it be ſtated in a caſe reſerved that the inſurance was *on account of the captors*, this precludes the conſideration whether a count in the declaration can be ſuſtained, averring the intereſt to be in the crown, and the inſurance to be made on account of his Majeſty. *Id. ib.*

Jeſuit's

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Jeſuit's bark, which in reality had not been captured at *Monte Video* from the Spaniards, but exchanged with them for articles which were. However, by a decree of the Admiralty Court, the whole cargo was condemned as prize taken at Monte Video, and Lord ELLENBOROUGH held this concluſive evidence that it was ſo, in ſupport of a count laying the intereſt in the captors.

The plaintiff recovered.

The *Attorney General*, *Garrow* and *Taddy* for the plaintiff.

Park, *Marryat*, and *Carr* for the defendant.

[Attornies, *Gregg & Corfield*, and *Kaye & Friſhfield*.]

REX *v.* FREDERICK POLLMAN, JOHN KEYLOCK, SARAH HARVEY, and JOHN WATSON.

Friday, July 14.

THIS was an indictment againſt the defendants, which charged that they "unlawfully and corruptly did meet, combine, conſpire, conſult, conſent, and agree among themſelves, and together with divers other evil diſpoſed perſons to the jurors unknown, unlawfully and corruptly to procure and obtain, receive, have,

A conſpiracy to obtain money by procuring from the Lords of the Treaſury the appointment of a perſon to an office in the cuſtoms, is a miſdemeanor at common law.

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have, and take, *to wit, to the uſe of them the ſaid F. P., J. K., and S. H., and of certain other perſons to the jurors likewiſe unknown*, a certain large ſum of money, to wit, the ſum of 2,000l. as a compenſation and reward for an appointment to be made by the Lords Commiſſioners of the Treaſury of our Lord the King, of ſome perſon to a certain office touching and concerning his Majeſty's cuſtoms; to wit, the office of a coaſt waiter in the Port of London, through the corrupt means and procurement of them the ſaid *F. P.*, *J. K.*, and *S. H.*, and certain other perſons to the jurors unknown; the ſaid office then and there being an office of public truſt, touching the landing and ſhipping coaſtwiſe of divers goods, liable to certain duties of cuſtoms." The indictment then went on to ſtate various overt acts in furtherance of the conſpiracy. There were ſeveral other counts, which all laid the conſpiracy in the ſame way.

Eſpinaſſe for the defendant *Pollman*, propoſed to argue, that the indictment was bad on the face of it, as it was not a miſdemeanor at common law to ſell or to purchaſe an office like that of coaſt waiter; and that however reprehenſible ſuch a practice might be, it could only be made an indictable offence by act of parliament.

Lord ELLENBOROUGH.—If that be a queſtion, it muſt be debated on a motion in arreſt of judgment, or on a writ of error. But after reading the caſe of *Rex* v. *Vaughan*

v. *Vaughan* in *Burrow* (*a*), it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.

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GROSE, J. in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law (*b*).

It appeared that the defendants *Pollman*, *Keylock*, and *Harvey* had entered into a negociation with one *Hesse*, to procure him the office mentioned in the indictment for the sum of 2,000l. which they had agreed to share amongst themselves in certain stipulated proportions; but although this money was lodged at the banking house of *Sykes*, *Snaith*, & Co. in which the defendant *Watson* was a partner, and he knew it was to be paid to *Pollman* and *Keylock* upon *Hesse*'s appointment, there was no evidence to shew that he knew that *Sarah Harvey* was to have any part of it, or that she was at all implicated in the transaction.

An indictment against A., B., C., and D. charged, that they conspired together to obtain, "viz. to the use of them the said A., B., and C. and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Held, that the averment concerning the application of the money was material, though coming under a *viz.* and that as to D. the conspiracy was not proved as laid.

(*a*) 4 Burr. 2494. in which a criminal information was granted for offering the Duke of Grafton, then first Lord of the Treasury, the sum of 5000l. as a bribe to procure the reversion of the office of Clerk of the Supreme Court of the Island of Jamaica.

(*b*) Vid. 3 Inst. 147. 1 Hawk. P.C. c. 67. Stockwell v. North, Noy, 102. Moor, 781. S. C. Rex v. Beale, 1 East, 183. Rex v. Southerton, 6 East, 126. Rex v. Phillips, 6 East, 464.

Lord

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Lord ELLENBOROUGH threw out a doubt whether as to *Watſon* the indictment was ſupported by the evidence.

The *Attorney General* contended, that the words in *italicks*, coming under a videlicet, might be entirely rejected. The ſenſe would be complete without them. The indictment would then run, that the defendants conſpired together to obtain a large ſum of money as a conſideration and reward for an appointment to be made by the Lords Commiſſioners of the Treaſury. This was the *corpus delicti*. The uſe to which the money might be applied was wholly immaterial. The offence of conſpiring together would be complete, however the money might be diſpoſed of. There was no occaſion to ſtate this, and the averment might be treated as ſurpluſage. Suppoſe the manner in which the money was to be diſpoſed of had been unknown, would it have been impoſſible to convict thoſe engaged in the conſpiracy? But without rejecting the words, the variance was immaterial. The charge in the indictment had been ſubſtantially made out as laid.

Dallas and *Walton*, of counſel for *Watſon*, denied that the words could be rejected though laid under a videlicet, as they were material, and they were not repugnant to any thing that went before. The application of the money might be of the very eſſence of the offence. Suppoſe it had been obtained for the uſe of the Lords of the Treaſury, who were to make

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the appointment: Would not this be a much greater crime than if the money had been obtained for the benefit of a public charity?—But if the words were rejected, then the variance was more palpable. In that case, there being no mention of any persons to whose use the money was obtained, the necessary presumption was, that it was obtained to the use of the defendants themselves. The evidence shewed, however, that *Watson* was to have no part of it, and that he was utterly ignorant of the manner in which it was to be distributed.

Lord ELLENBOROUGH.—There can be no doubt that the indictment might have been so drawn as to include *Watson* in the conspiracy. Even if the manner in which the money was to be applied was unknown, this might have been stated on the face of the indictment, and then no evidence of its application would have been required. The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think, that as to *Watson*, it is not. He is charged with conspiring to procure this appointment through the medium of Mrs. *Harvey*, of whose existence, for aught that appears, he was utterly ignorant. When a conspiracy is charged, it must be charged truly.

If a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment and to receive the money.

Garrow submitted that it was unnecessary to prove that each of the defendants knew how the money was to be disposed of, and that it was enough to shew that the destination of the money was as stated in the indictment—a fact of which all those engaged in the con-

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ſpiracy muſt be taken to be cognizant. *Watſon*, by engaging with the other conſpirators to gain the ſame end, had adopted the means by which the end was to be accompliſhed.

Lord ELLENBOROUGH.—You muſt prove that all the defendants were cognizant of the object of the conſpiracy, and the mode ſtated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous.—The defendant *Watſon* muſt be acquitted.

The other three defendants were found guilty.

The *Attorney-General*, *Garrow*, and *Richardſon*, for the proſecution.

Dallas, *Walton*, The *Common Serjeant*, *Lawes*, *Eſpinaſſe*, and *Gaſelee*, for the defendants.

[Attornies, *Litchfield* and *Aubrey*.]

Now, by ſtat. 49 G. 3. c. 126. § 3. it is *declared* and enacted, that if any perſon or perſons ſhall ſell, or bargain for the ſale of, or receive, have, or take, any money, fee, &c. directly or indirectly, or any promiſe, &c. for any office, commiſſion, place, or employment in the gift of the crown, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or reſignation thereof, or for the conſent or voice of any perſon to any ſuch appointment, nomination, or reſignation; then and in every ſuch caſe, every ſuch perſon, and alſo every perſon who ſhall wilfully and knowingly aid, abet, or aſſiſt ſuch perſon therein, ſhall be deemed and adjudged guilty of a miſdemeanor.

meanor. By § 4 & 5 it is made a misdemeanor to receive or take, or to pay or give any money or promise for the soliciting or obtaining of offices; or to open or keep any house for transacting business relating thereto; and § 6. imposes a penalty of 50l. upon any person who shall publish, or procure or permit to be published, any advertisement or proposal for the above purposes. And by 49 Geo. 3. c. 118. any person paying or promising any money or reward to procure himself to be returned to serve in parliament shall, if not returned, forfeit 1,000l.; if returned, vacate his seat, and be incapacitated to serve during that parliament for the same place; and the person receiving such money or promise shall forfeit the amount, together with 500l.: and if any person give or promise any OFFICE upon *any express contract or agreement* to procure the return of any person to serve in parliament, the person returned shall vacate his seat, and be incapacitated as before; the person receiving the office shall forfeit it, be disabled to hold it, and incur a penalty of 500l.; and any person holding any office under His Majesty, who shall give an office, appointment, or place, upon any such *express contract or agreement*, shall forfeit the sum of 1,000l.

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PARMETER *v.* COUSINS.

Saturday, July 15.

THIS was an action on a policy of insurance on ship and freight, valued at £1,200, at and from *St. Michael's*, or all or any of the Western Islands, to England.

Policy *at and from the island of St. Michael's.* The ship arrived there in a very disabled state, and after lying at anchor above 24 hours in great danger from a storm, was blown out to sea and wrecked.—Held that the policy on the homeward voyage never attached.

The ship met with very tempestuous weather on her outward voyage; and when she arrived at *St. Michael's* she was so leaky that the crew were obliged to work at the pumps *spell and spell.* She was then quite in

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an unfit ſtate to take in a cargo, and there being no harbour in the iſland, ſhe was in great danger from the ſtorm, which ſtill continued. In fact, after lying at anchor above 24 hours, ſhe was blown out to ſea and was wrecked.

Park for the plaintiff contended, that the underwriters were clearly anſwerable for a loſs ſo happening. The policy being *at* as well as *from*, attached the moment the ſhip caſt anchor at *St. Michael*'s; and at any rate ſhe had lain there 24 hours, ſo that the outward riſk had completely expired. The objection of want of ſea-worthineſs when properly conſidered was without any foundation. The ſhip, on her arrival at *St. Michael*'s, was unfit to commence the homeward voyage; but this was unneceſſary. It was enough if ſhe was fit for the voyage, when the voyage commenced. One ſtate of ſea-worthineſs was required while ſhe remained *at*, and another when ſhe ſailed *from*, the place. This diſtinction had been ſettled by Lord Kenyon (*a*), and recognized by Lord Ellenborough (*b*). If it were not allowed, the policies on the homeward voyage would in almoſt every inſtance be vitiated; as it ſeldom happens that a ſhip on her arrival at the outward port wants no repairs, but is in a condition immediately to take in the homeward cargo. If, in this caſe, the policy on the outward voyage had expired, and the policy on the homeward voyage had

(*a*) Forbes v. Wilſon, Park, 299 *n.* Marſh, 155. Smith v. Surridge, 4 Eſp. 25. S. P.

(*b*) *Hibbert v. Martin, Sitt. after M. T.* 1808.

not

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not attached, how was the ſhip-owner to ſecure himſelf an indemnity during the whole courſe of the adventure?

Lord ELLENBOROUGH.—What we have to conſider here is, whether the underwriters on this ſhip, *at and from St. Michael's to England*, be liable for a loſs happening in the manner that has been deſcribed? And I am clearly of opinion, that they are not. To be ſure, while the ſhip remains *at* the place, a ſtate of repair and equipment may be ſufficient, which would conſtitute unſeaworthineſs after the commencement of the voyage. But while in port, ſhe muſt be in ſuch a condition as to enable her to lie in reaſonable ſecurity till ſhe is properly repaired and equipped for the voyage. She muſt have once been *at* the place in good ſafety. If ſhe arrives at the outward port ſo ſhattered as to be a mere wreck, a policy on the homeward voyage never attaches. Such is the preſent caſe. I do not remember any one like it; but the principles on which it muſt be decided are perfectly well eſtabliſhed.

Plaintiff nonſuited.

Park and *Richardſon* for the plaintiff.

The *Attorney-General*, *Garrow*, *Scarlett*, *Barrow*, and *F. Pollock*, for the defendant.

[Attornies, *Sherwood* and *Burrow*.]

In *Motteaux* v. *The London Aſſurance Co.* 1 Atk. 548, Lord Chancellor HARDWICKE ſays, that a caſe came before him when

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when Chief Juſtice at Guildhall, in which it was debated, "whether *at and from Bengal* to *England*, meant the firſt arrival of the ſhip at Bengal? And it was agreed the words *firſt arrival* were implied and always underſtood in policies." I do not find any thing more in the books concerning the time at which the policy on ſhip, at and from a foreign port, attaches; and there ſeems no doubt that the rule laid down by Lord Hardwicke, qualified by the caſe of *Parmeter* v. *Couſins*, is to be conſidered as eſtabliſhed law upon the ſubject. But perhaps it might have been better to have held, that the policy on the homeward voyage commences at the time when that on the outward voyage expires. Suppoſe a ſhip to arrive ſafe at the outward port, and to be wrecked or captured before ſhe has been moored 24 hours in good ſafety, the aſſured being *more than ordinarily protected* during this period, may make their election between the underwriters on the outward or on the homeward voyage, and ſome confuſion, if not injuſtice, may ariſe in finally adjuſting the loſs.

Wedneſday, July 19.

SCOTT *v.* M'INTOSH.

An action of *aſſumpſit* cannot be maintained on a running account between a merchant and a broker—the proper remedy at law being, an action of *account*.

ASSUMPSIT for commiſſion on the ſale of goods, for money paid, for money had and received, and on an account ſtated. Plea, the general iſſue.

This action was brought to recover the balance of an account which had been running between the parties for ſeveral years, and which conſiſted of ſeveral thouſand items. The plaintiff's caſe being opened by the *Attorney-General*,

Lord ELLENBOROUGH ſaid, this being ſtrictly a matter of account, if it was to be inveſtigated in a court of law, the action of account was the proper remedy,

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remedy. I ſhould be fully warranted in ſtopping the trial and requiring the plaintiff to inſtitute a different mode of proceeding. Thoſe who ſo wiſely framed our juriſdictions did not contemplate a long account between merchants being referred to a jury. This tribunal is quite unfit for ſuch an inveſtigation; and we have not the neceſſary time to beſtow upon it. Let the plaintiff bring his action of account, and auditors will be appointed, who will do juſtice between the parties, without producing any inconvenience to the public.

The *Attorney-General* allowed that the action of account was the proper mode of proceeding; but ſaid aſſumpſit had been brought, in the confidence that the matters in difference would have been referred to an arbitrator, who would have performed the office of the auditors.

The defendant would not agree to a reference, and the plaintiff ſubmitted to be nonſuited.

The *Attorney-General*, *Garrow*, and *Taddy* for the plaintiff.

Beſt, Serjeant, *Marryat*, and *Lawes*, for the defendant.

[Attornies, *Kaye & Freſhfield* and *Willet & Anneſley*]

" On *indebitatus* no evidence " can be given of an account " current, becauſe ſuch examination would be too tedious " upon

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"upon iſſues; and therefore "upon this caſe, an action of "*account* is provided, wherein "there is judgment *quod compu-* "*tet* before a maſter or auditor "where the whole matters on "both ſides are examined, ſtated, "and balanced." Gilb. Law Ev. 192.—Vide etiam, Lincoln v. Parr, 2 Keb. 781. Tri. per Pais, 401.

Wedneſday, July 19.

ZAGURY *v.* FURNELL and another.

Goods ſold remain at the riſk of the ſeller while any thing is to be done to them by him to aſcertain the amount of the price. Therefore where 289 bales of ſkins (ſtated in the contract to contain 5 dozen in each bale) were ſold at 57*s.* 6*d.* a dozen; and it was the duty of the ſeller to count over the ſkins to ſee how many each bale actually contained; but before any enumeration took place, the whole were conſumed by fire;—held, that an action could not be maintained againſt the purchaſer for the value of the ſkins, and that the loſs fell entirely upon the ſeller.

SPECIAL aſſumpſit for not accepting bills of exchange for the price of certain goat ſkins ſold by the plaintiff to the defendants, to be paid for in this manner; together with counts for goods bargained and ſold, and goods ſold and delivered.

The *bought note* was in the following form:

"Bought of Mr. S. Zagury of Great Preſcott "Street, 289 bales of goat ſkins from Mogadore, per "Commerce, Capt. John Horſwell, containing five "dozen in each bale at the rate of 57*s.* 6*d.* per do- "zen, to be taken as they now lay with all faults, "paid for by good bills at 5 months.

"London, 27th April 1809.

"14 days prompt."

It

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It appeared that by the uſage of trade it is the duty of the ſeller of goat ſkins by bales in this manner, to count them over, that it may be ſeen whether each bale contains the number ſpecified in the contract, and that on the 14th of May, before any of the ſkins in queſtion had been counted over, the whole were deſtroyed by fire at the wharf where they lay at the time of the ſale.

The *Attorney-General* for the defendant contended, on the authority of *Hanſon* v. *Meyer*, 6 Eaſt, 614. and *Hinde* v. *Whitehouſe*, 7 Eaſt, 558. that the action could not be maintained. Something remained to be done by the vendor to aſcertain the amount of the price. Till the enumeration took place, it was impoſſible to ſay for what ſum the bills ſhould be drawn. The plaintiff had not ſhewn, and could not ſhew, that he had a right to draw the bills which the defendant refuſed to accept. Till the ſkins were counted, therefore, they remained at the riſk of the ſeller, and he muſt ſubmit to the loſs.

Garrow, contra, argued that the loſs muſt fall upon the perſon whoſe property the goods were; and there could be no doubt that from the moment the contract was ſigned, the property of the goods veſted in the purchaſer. As to the number of the ſkins, probable evidence muſt be ſufficient in this as in other caſes. It would be for the jury to ſay, whether they believed that there were five dozen, or what ſmaller number, in each bale.

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Lord ELLENBOROUGH was of opinion, that as the enumeration of the ſkins was neceſſary to aſcertain the price, this was an act for the benefit of the ſeller; and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaſer, and the ſkins continued at the ſeller's riſk. The number of ſkins actually contained in the 289 bales being uncertain, the plaintiff had failed to ſhew that he was authoriſed by the terms of the contract to draw the bills which the defendants had refuſed to accept.

Plaintiff nonſuited.

Garrow, *Taddy*, and *Smith*, for the plaintiff.

The *Attorney-General*, *Marryat*, and *Barnewall* for the defendants.

[Attornies, *Anneſley* and *Willis*.]

The plaintiff afterwards brought an action on the ſame contract in the court of *C. P.* which was tried at the ſittings after laſt Hilary term. Sir J. MANSFIELD, C. J. likewiſe directed a nonſuit, being of opinion that it was neceſſary to ſhew the number of the ſkins; and that, without this evidence, the plaintiff could not recover on the general counts for goods bargained and ſold, any more than on the ſpecial counts for not accepting the bills of exchange. Vide Rugg v. Minett, 11 Eaſt, 210. Phillimore v. Barry, 1 Campb. 513.

HARMAN

HARMAN and others, Assignees of Dudley, a Bankrupt, *v.* ANDERSON and others. Thursday, July 20.

TROVER for 600 casks of butter.

The bankrupt, an Irish provision merchant, in December 1807 bought the goods in question, which were then lying in the warehouses of the defendants, who are wharfingers in the Borough. Along with the invoice the bankrupt received from the sellers an order to deliver the goods, which he lodged with the defendants. The defendants thereupon transferred the goods in their books to his name, and actually debited him with warehouse rent. Immediately after the goods had been so transferred, he became insolvent, and the sellers gave the defendants notice to hold the goods on their account. A commission of bankrupt being sued out against *Dudley*, the plaintiffs as his assignees demanded the goods of the defendants, but they delivered the whole of them back to the sellers.

When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them *in transitu* is gone, and the wharfinger is bound to hold them as the agent of the purchaser. *Et per Curiam in Banco*, The same effect is produced, by the delivery-note being lodged with the wharfinger, without a transfer in his books.

The *Attorney-General* for the defendants argued, that they were justified in doing so, on the ground that the sellers' right to stop in transitu subsisted at the time of Dudley's insolvency. The goods remaining with the wharfingers could not be considered as delivered to him, and he had never exercised any act of ownership over them. The wharfingers were not his agents.

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agents, but the agents of the ſellers. No ſuch effect as determining the right to ſtop in tranſitu could be aſcribed to the transfer in the wharfingers books, without entirely altering the law upon this ſubject; as it almoſt invariably happens that goods ſent by a carrier are booked in the name of the conſignee, and goods are made deliverable to the purchaſer in almoſt every bill of lading.

Beſt, Serjeant, relied upon the caſe of *Hurry* v. *Mangles*, 1 Campb. 452, in which it was held, that if goods when ſold remain in the warehouſe of the vendor, and he receives warehouſe rent for them, this amounts to a delivery of the goods to the purchaſer, ſo as to put an end to the vendor's right of ſtopping them in tranſitu. Here, rent had been charged by the defendants to *Dudley* from the time they transferred the goods into his name. There is a clear difference between the caſe of a carrier, and that of a warehouſeman or wharfinger like the defendants. While the goods are in the hands of the carrier, they are ſtill in tranſitu; but when they come to the warehouſeman or wharfinger who finally holds them for the real owner, they have reached their deſtination, and the tranſit is at an end.

Lord ELLENBOROUGH.—The goods having been transferred into the name of the purchaſer, it would ſhake the beſt eſtabliſhed principles, ſtill to allow a ſtoppage in tranſitu. From that moment the defendants

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ants became truſtees for the purchaſer, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of rent in theſe caſes is a circumſtance to ſhew on whoſe account the goods are held; but it is immaterial here, the transfer in the books being of itſelf deciſive. I am clearly of opinion that the aſſignees are entitled to recover.

Verdict for the plaintiffs.

In the enſuing term, the *Attorney General* expreſſed his acquieſcence in the direction of the Judge at Niſi Prius; but moved to reduce the damages, on an affidavit, ſtating, that as to one parcel of the butters, no transfer had been made in the defendants' books to the bankrupt before the bankruptcy. In reſpect to this parcel, the facts were, that *Dudley* having received the delivery note from the vendor, ſent it to the defendants, in whoſe warehouſe the goods were lying; and that they neither made any transfer in their books to his name, nor did any thing to teſtify that they accepted the delivery note or held theſe goods on his account. There had been no delivery therefore of this parcel, and the right of ſtopping in tranſitu ſtill ſubſiſted when the vendor interfered.

Lord ELLENBOROUGH.—After the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaſer. The delivery note

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port where her loading was completed to join convoy at the usual place of rendezvous, with the intention of proceeding, according to the established course of navigation, to her port of final destination. This was decided in *Bond* v. *Nutt*, Cowp. 601. where a ship being warranted to sail from *Jamaica* on or before the 1st of August, it was held sufficient that she sailed before that day to *Bluefields* to join convoy, although this place was not in the direct line of the voyage insured. So in *Thelluſſon* v. *Ferguſſon*, Doug. 346. a ship warranted to sail from *Guadaloupe* before the 31st of December, sailed on the 24th of October to *Basseterre* to join convoy and receive the orders of government, where she was detained till the 10th of January, yet the sailing to *Basseterre* was held a compliance with the warranty. The circumstance in this case, that the insurance was from *Surinam* or all or any of the West India islands, could make no difference, as that latitude was evidently introduced for the benefit of the assured, and when the ship sailed from the port of lading on the homeward voyage, it was the same as if that were the only place *at and from* mentioned in the policy.

The *Attorney General*, *contrà*, maintained that it was requisite that the ship should have sailed from the *West Indies* on or before the 1st of August. Had the insurance been barely from Surinam to England, the cases cited would have been conclusive; but by the terms

terms of the policy, any of the Weſt India iſlands, except *Jamaica*, might become a *terminus a quo*, and if the ſhip touched at any of them, ſhe was bound to ſail from it for London by the given day. *Tortola* had in fact been made the port from which the homeward voyage commenced; and as ſhe did not ſail from thence till the 8th of Auguſt, the warranty was falſified. The object of the underwriters was, that the ſhip ſhould have cleared the Weſt India Seas by the 1ſt of Auguſt; and if ſhe had done ſo, ſhe would have arrived ſafe in England.

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Lord ELLENBOROUGH held, that as the veſſel came to *Tortola*, not to take in goods or ſtores, but merely to join convoy, the homeward voyage muſt be conſidered as having commenced on the 19th of July, when ſhe ſailed from *Surinam*. *Surinam* becoming the only loading port, the remaining deſcription of the riſk might be conſidered as ſtruck out of the policy. The warranty therefore had been complied with, according to the principle of former deciſions.

Mr. *Taylor*, a ſpecial juryman, ſaid, that this was the conſtruction univerſally put upon theſe policies in the city of London.

The plaintiff had a verdict; which, on a motion for a new trial, the COURT afterwards affirmed, obſerving, that it was enough if there was an inception of

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the homeward voyage before the 1ſt of Auguſt; that the ſailing to Tortola to join convoy was in the courſe of the voyage home; and that Surinam being the final port of loading, the caſe was the ſame as if that place only had been mentioned in the policy as the *terminus a quo*.

Marryat and *Boſanquet* for the plaintiffs.

The *Attorney General* and *Carr* for the defendant.

[Attornies, *Atcheſon* and *Gregg*.]

COURT

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER.

After Trinity Term,
49 GEORGE III.

1809.
Thurſday, June 29.

EARL OF LEICESTER *v.* WALTER.

THIS was an action for a libel in a newſpaper called *The Morning Herald*, which ſtated that the plaintiff was charged by his Lady with the ſame offence for which Lord Audley had been executed in the reign of Charles I. The declaration began and concluded with the common averments, that the plaintiff never had been guilty, nor till the publiſhing of the libel been ſuſpected to have been guilty, of any ſuch offence, and that by reaſon of the publiſhing of this libel, his neighbours and other good and worthy ſubjects of our Lord the King had refuſed to aſſociate with him as they were uſed to do and would otherwiſe have done.

In an action for a libel, the defendant, under the general iſſue, may prove, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally ſuſpected to be guilty of the crime thereby imputed to him, and that on account of this ſuſpicion, his relations and acquaintance had ceaſed to aſſociate with him.

Plea, *not guilty.*

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EARL OF LEICESTER v. WALTER.

The plaintiff having launched his caſe,

The defendant's counſel propoſed to call witneſſes to prove, in mitigation of damages, that before and at the time of the publication of the libel, there was a general ſuſpicion of the plaintiff's character and habits; that it was generally rumoured that ſuch a charge had been brought againſt him; and that his relations and former acquaintance had, on this ground, ceaſed to viſit him.

Beſt, Serjeant, for the plaintiff objected to the admiſſibility of this evidence. It would be vain to bring an action of ſlander if ſuch a courſe of proceeding were permitted. How could the plaintiff come prepared to defend every act of his life which might be maliciouſly miſrepreſented? The defendant pleaded only the general iſſue *not guilty*. The plaintiff, therefore, had no reaſon to ſuppoſe that any thing was diſputed but the publication of the libel, and the innuendoes in the declaration. There was nothing on the record to put the character of the plaintiff in iſſue; and to admit ſuch evidence would only be giving the defendant an opportunity of continuing and aggravating the original libel.

Shepherd, Serjeant, and *Abbott*, *contra*.—The facts to be proved do not amount to a complete juſtification. Therefore, they may be given in evidence under the general iſſue for the purpoſe of mitigating the damages. Theſe facts are moſt material to the merits of

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EARL OF LEICESTER v. WALTER.

of the cauſe, and juſtice cannot be done if they are ſhut out from the conſideration of the jury. Although the plaintiff may be entitled to the verdict, a moſt important queſtion remains as to the amount of the damages. How can this be aſcertained without enquiring what opinion was previouſly entertained of the plaintiff by thoſe who knew him, and in what manner they behaved to him? He ſays the libel has driven him from ſociety, and ruined his character. If ſo, he is entitled to the higheſt meaſure of compenſation ever given upon ſuch an occaſion; but ought he to receive more than nominal damages, if before the publication of the libel he was an out-caſt from ſociety and he had no character to loſe? In actions for ſeduction and criminal converſation, it is the conſtant practice to give evidence of the character of the daughter or wife. The value of the thing loſt or injured muſt invariably be inquired into.—This principle has been expreſsly applied to actions of ſlander. In *Knobell* v. *Fuller* (*a*), EYRE, C. J. held, that although where the defendant contends that the libel or words are true, he muſt juſtify on the record, yet he may, on the general iſſue, prove, in mitigation of damages, ſuch facts and circumſtances as ſhew a ground of ſuſpicion, not amounting to actual proof of the plaintiff's guilt. So in Sir *John Eamer* v. *Merle* before Lord ELLENBOROUGH, which was an action for words of inſolvency, the defendant was permitted to

(*a*) Peak. Law Ev. Appendix xcii. Ed. 3.

1809.
EARL OF LEICESTER v. WALTER.

prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured. And in a case before LE BLANC, J. at *Worcester*, that learned judge received evidence under the general issue, that the plaintiff had been guilty of *attempts* to commit the crime which the defendant had imputed to him.

Best, Serjeant, observed in reply, that the cases of seduction and criminal conversation were not in point; as there, the whole of the defence, of whatever nature, might be given in evidence under the general issue; but that if this was the law in slander, no plaintiff ought to come into court, since a malicious and artful defendant might invariably ruin his character, by shaping the defence a little short of a justification.

Sir JAMES MANSFIELD, C. J. — In point of reasoning, I never could answer to my own satisfaction the arguments urged by my brother *Best*. At the same time, as it seems to have been decided in several cases, that if you do not justify, you may give in evidence any thing to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that

that his character was in as bad a situation before as after the libel, must therefore be admitted.

The witnesses were accordingly examined; and the CHIEF JUSTICE, in his summing up said, The jury would consider, in assessing the damages, whether the reports which had been proved were sufficient to shew that he could receive little injury; and in this point of view, it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

The jury, nevertheless, awarded the plaintiff 1,000l. damages.

Shepherd, Serjeant, and *Abbott* for the plaintiff.

Best, Serjeant, for the defendant.

The defendant afterwards moved for *a new trial*, on account of excessive damages, and in *arrest of judgment*, on the ground that some of the counts did not set out any actionable libel; but the Court wait for the decision of the case of *Kaye* v. *Bailey*, depending in the Exchequer Chamber; in which the question is, whether an action will lie for words in writing which would not be actionable if merely spoken.

HOME CIRCUIT.

SUMMER ASSIZES, 49 GEORGE III.

CHELMSFORD.

CORAM Sir A. M'DONALD, C. B.

1809.
Thurſday, July 27.

DOE *ex d.* HINDE *v.* VINCE.

If a tenant from year to year hold from *old Michaelmas*, a notice to quit "*at Michaelmas*" generally, is good.

EJECTMENT by landlord againſt tenant from year to year.

The leſſor of the plaintiff relied upon a notice ſerved upon the defendant at Lady-day 1808; whereby he was required to quit and deliver up poſſeſſion of the premiſes on *Michaelmas day then next*. It appeared that the defendant entered at *Michaelmas old ſtyle*.

Garrow for the defendant inſiſted, that the notice to quit was inſufficient, as it did not ſpecify that period of the year when the tenancy commenced. By *Michaelmas*, mentioned in the notice, muſt be underſtood *Michaelmas* as fixed by act of parliament, namely, *new Michaelmas*, or the 29th day of Sept.

But

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DOE *ex d.* HINDE *v.* VINCE.

But the holding was proved to have been from *old Michaelmas*, or the 11th day of October. Therefore, as the notice did not require the defendant to quit on the latter day, but twelve days before the current year of his tenancy expired, it was clearly bad.

Sir A. M'DONALD, C. B. — A notice to quit at *Michaelmas* generally, *primâ facie* means *new Michaelmas*. But beſides the *ſtatute Michaelmas*, there may be a *conventional Michaelmas*; and evidence is receivable to ſhew in what ſenſe the word is uſed between the parties. In this caſe, the meaning of the notice is aſcertained by the commencement of the tenancy. The holding being from *old Michaelmas*, it muſt be taken that in all tranſactions concerning the premiſes, where *Michaelmas* is mentioned, *old Michaelmas* is meant. This notice to quit, therefore, muſt be underſtood to ſpecify *old Michaelmas day*, and I think it was ſufficient to determine the tenancy which commenced at that ſeaſon of the year.

The leſſor of the plaintiff recovered.

Shepherd, Serjeant, and *Gurney* for the leſſor of the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Hall* and *Sutton*.]

S. P. ruled by Lord ELLENBOROUGH in *Doe* v. *Brookes* at Hertford, ſame aſſizes, *ut audivi*.

Where it was uncertain whether the year expired at *new* or *old Lady-day*, a notice to quit "on

1809.

Doe *ex d.* Hinde *v.* Vince.

"on the 25th of March, or the 8th of April," was held ſufficient, Doe dem. Mathewſon v. Wrightman, 4 Eſp. N. P. Caſ. 6. But where there is any doubt upon this ſubject, the moſt eligible notice ſeems to be "to quit at the expiration of the current year of the tenancy, which ſhall expire next after the end of one half year from the ſervice of the notice." Doe dem. Phillips v. Butler, 2 Eſp. N. P. Caſ. 589. Tidd's Appendix 660. Nor will the landlord in this way loſe the advantage he was at one time ſuppoſed to have, of throwing the burthen of proof upon the the tenant; for the doctrine that a notice to quit at a particular day, is *primâ facie* evidence of a holding from that day, ſeems now exploded.

Thurſday, July 27.

Carrington *v.* Taylor.

It is actionable to diſcharge a gun ſo near an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy.

THIS was an action on the caſe for diſturbing the plaintiff's ancient decoy, ſituate at *Beaumont-cum-More* in the county of Eſſex.

It appeared that the defendant, who earned his ſubſiſtence by ſhooting wild fowl, fired his gun from a boat in a ſalt water creek, at the diſtance of two or three hundred yards from the decoy, without approaching nearer it, or trying to kill any of the birds which had entered it; but that the report cauſed them to leave it in great numbers, and to fly off to a diſtant part of the coaſt.

Garrow

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Garrow contended, that the action could not be maintained without evidence that the defendant had ſhot at the wild fowl in the decoy, or had fired his piece with the malicious intent of frightening them away. But his only object was to earn a ſubſiſtence by the buſineſs which he followed; and although the wild fowl at which he took aim, might by poſſibility have gone to the plaintiff's decoy, and been caught there, yet they were at the time *of common right*, as much as if they had been met with many leagues out at ſea. The plaintiff was equally entitled to kill them on the wing, as the plaintiff after they were enſnared in the decoy. Some of the ducks already in the decoy might be frightened by the report; but it would be too much to ſay, that every noiſe that could be heard there, from whatever diſtance, was illegal and actionable; otherwiſe, the operations of huſbandry and the buſineſs of life muſt be ſtopped for miles round the ſpot where one of theſe decoys is unfortunately ſituated. It was neceſſary, therefore, to look to the *intent*; and where that was innocent, the foundation of the action failed.

M'DONALD, C. B.—If the plaintiff has been injured and aggrieved by what the defendant has done, the law infers that the defendant malicioufly intended to injure and aggrieve him. And there ſeems no doubt that the decoy was rendered leſs valuable by the wild fowl being frightened from it, and deterred from returning. This being an ancient decoy, it is privileged in law, and whatever ſeriouſly diſturbs it is actionable.

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CARRINGTON v. TAYLOR.

actionable. From long uninterrupted enjoyment, a grant must be presumed from the owners of the surrounding lands, for which an adequate consideration may be supposed to have been originally given; and an ancient decoy will be protected by the law, as well as ancient lights, or the enjoyment of a watercourse.

The plaintiff had a verdict.

In the ensuing term *Garrow* moved for a rule to shew cause why this verdict should not be set aside; and in addition to his former arguments contended, that there was no distinction between a decoy and a preserve for game, but that clearly no action could be maintained for frightening game from a *preserve* while a man shot upon his own land.

The COURT, however, said, a difference was established by the old cases between a preserve and a decoy; and thinking that a sufficient disturbance had been proved, refused a rule to shew cause.

Shepherd, Serjeant, and *Pooley* for the plaintiff.

Garrow and *Marryat* for the defendant.

Vide Keeble v. Hicheringill, 11 Mod. 74. 130. 3 Salk. 9. Bul. N. P. 79.

BOULCOTT

1809.
Friday,
July 28.

BOULCOTT *v.* WINMILL.

There may be a valid cuſtom in a manor within the limits of an antient foreſt belonging to the crown, for the lord, with the aſſent of the homage, to grant parcels of the waſte to be held in ſeveralty by copy of court roll and incloſed, in excluſion of perſons having rights of common.

TRESPASS for breaking and entering the plaintiff's cloſe in the pariſh of Weſtham, in the county of Eſſex, and cutting down and proſtrating the pales and fences ſtanding therein.

Juſtification under a right of common of paſture over the *locus in quo*.

Replication, that the *locus in quo* is, and from time immemorial has been within, and parcel of, the manor of Weſtham; and that there is, and from time immemorial hath been, "a certain ancient and laudable cuſtom there uſed and approved of (that is to ſay) that at the general courts baron or cuſtomary courts from time to time holden in and for the ſaid manor, the lord or lords thereof for the time being hath and have granted, and been uſed, &c. and ſtill, &c. by the hands of the ſteward of the ſaid manor for the time being, with the aſſent of the homage, by the rod, according to the cuſtom of the ſaid manor, any pieces or parcels of land within the ſaid manor, being part of the waſte thereof, to any perſon or perſons willing to take the ſame, to be holden of the lord or lords of the ſaid manor by copy of court roll thereof, at the will of the lord, &c. and that ſuch perſon or perſons to whom ſuch grants have been and may be made, hath and have incloſed, fenced off, held, and enjoyed,

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and been uſed, &c. and ſtill, &c. ſuch pieces or parcels of land ſo granted as aforeſaid, in ſeveralty after ſuch grants, and during the continuance thereof to his and their own uſe, againſt all perſons having rights of common therein, to the excluſion and abolition of ſuch rights of common;" and that the *locus in quo* being granted to the plaintiff according to this cuſtom, he entered and incloſed it, and kept it ſo incloſed till the defendant, of his own wrong, committed the treſpaſſes attempted to be juſtified.

Rejoinder traverſing the cuſtom; and iſſue thereupon.

Various inſtances were proved from the year 1632 down to the preſent time, in which different parcels of the waſtes of the manor had been granted and incloſed in the manner ſtated in the replication.

It further appeared that the manor of Weſtham lies partly within the ancient foreſt of Waltham, which has immemorially belonged to the crown, and that the *locus in quo* is in that part of the manor which is within the limits of the foreſt, and is ſubject to the juriſdiction of the foreſt courts. There was nearly an equal number of grants in the part of the manor within, as in the part of the manor without, the foreſt.

Shepherd, Serjeant, for the defendant contended, that in point of law the jury were bound to find againſt the

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BOULCOTT v. WINMILL.

the cuſtom. Within a royal foreſt no incloſures are to be permitted. The deer muſt have full range over its whole extent. This cuſtom of incloſing is quite inconſiſtent with the foreſt rights which have been veſted in the crown from time immemorial. If one part of the foreſt might be incloſed, ſo by poſſibility might the whole, and the foreſt might thus be entirely extinguiſhed. The cuſtom ſet up was tantamount to a right to diſafforeſt at the will of the lord and the homage, which clearly could not ſubſiſt in law. The foreſt rights, as regulated by the charter of the foreſt and other ſtatutes, were as much recognized and protected by law as any other prerogative of the crown. The verderors of Waltham foreſt were in the conſtant habit of throwing down fences and incloſures erected within its limits. The practice of granting pieces of the waſte of Weſtham manor within the foreſt for the purpoſe of being incloſed, might have prevailed for a conſiderable length of time; but being entirely incompatible with the rights of the crown, it could not be conſidered a legal and ſubſiſting cuſtom.

Sir A. M'DONALD, C. B. was of opinion that the cuſtom was clearly made out in point of fact, and wiſhed that the queſtion as to its compatibility with the rights of the crown might be diſcuſſed elſewhere.

Accordingly the plaintiff had a verdict, and

In the enſuing term *Shepherd*, Serjeant, applied to the court of K.B. for a rule to ſhew cauſe why the verdict

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ſhould not be ſet aſide, and a new trial had. He took the ſame ground as at Niſi Prius, and contended, that no ſuch cuſtom could legally ſubſiſt within the limits of a royal foreſt.

Lord ELLENBOROUGH.—I ſee no reaſon why the waſte may not legally be granted out in the manner ſtated in the replication, although part of the manor be within the royal foreſt of Waltham. The crown may ſtill exerciſe the ſame rights of foreſt over it as before. Whether the deer be excluded, muſt depend upon the nature of the incloſures. If the fences erected are higher than are permitted by the laws of the foreſt, the foreſt officers may ſtill interfere, and break them down. According to the cuſtom, the grant is only to the excluſion and abolition of rights of common, not of the rights of foreſt. I know inſtances in Windſor foreſt in which the crown has made grants in ſeveralty, reſerving the rights of foreſt, with an advanced rent while theſe rights ſhall not be exerciſed. I think the iſſue has been properly found for the plaintiff.

The other Judges concurring, a rule niſi was refuſed.

Garrow and *Marryat* for the plaintiff.

Shepherd, *Beſt*, Serjeants, *Garney* and *Curwood* for the defendant.

It was formerly doubted how far a cuſtom for the lord to make grants of the waſte with the aſſent of the homage, was good, where a ſufficiency of common is not left; but it is now

now ſettled that the practice of making ſuch grants is evidence of a right to do ſo reſerved by the lord when he granted a right of common over the waſte, and that therefore the former right is paramount to the latter. Folkard v. Hemmett, 5 T. R. 417 n. So the lord may dig clay pits in the waſte, or authorize others to do ſo, without leaving ſufficient herbage for the commoners, if ſuch right can be proved to have been always exerciſed by the lord. Bateſon v. Green, 5 T. R. 411. And where there is a cuſtom to grant parcels of the waſte, as in this caſe, the parcels ſo granted are to be conſidered in all reſpects copyhold tenements as if they had been ſo from time immemorial. Lord Northwick v. Stanway, 3 Boſ. & Pul. 346. So that where land has been *demiſeable* by copy of court roll, a new copyhold may be created at this day.—Vide Duberley v. Page, 2 T. R. 391. Clarkſon v. Woodhouſe, 5 T. R. 412. n. Shakeſpeare v. Peppin, 6 T. R. 741.

MAIDSTONE.

CORAM Lord ELLENBOROUGH, C. J.

1809.

Tuesday, Auguſt 1.

POPE q. t. *v.* DAVIES.

In an action on 1 & 2 P. & M. for driving a diſtreſs out of the hundred, if the hundred in which the cattle were diſtrained be in one county and the hundred into which they were driven be in another, the venue muſt be laid in the latter county.

THIS was an action on 1 & 2 Phil. & Mary c. 12. ſ. 1. (*a*) for driving a diſtreſs out of the hundred.

The cattle were diſtrained in the hundred of —— in the county of *Kent*, and were driven into the hundred of *Eaſt Brixton* in the county of *Surrey*, where they were impounded.

It was objected on the part of the defendant, that the action was brought in the wrong county. Nothing contrary to the ſtatute had been done in *Kent*.

(*a*) It is thereby enacted, that "no diſtreſs of cattle ſhall "be driven out of the hundred, "rape, wapentake, or lathe "where ſuch diſtreſs is or ſhall "be taken, except that it be to "a pound overt within the "ſame ſhire, not above three "miles diſtant from the place "where the ſaid diſtreſs is "taken,"—upon pain of forfeiting for every ſuch offence, an hundred ſhillings, and treble damages.

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No offence had been committed in that county. The cattle were not out of the hundred of ——— till they were in *Surrey*; and there the venue ought to have been laid, this being a penal action (*b*).

On the other ſide, it was contended, that driving the cattle out of the hundred was one act; that this had been begun in *Kent*, though it was perfected in *Surrey*, and that the plaintiff had his option to ſue in either county.

Lord ELLENBOROUGH ruled that the venue was improperly laid; and the plaintiff was nonſuited (*c*).

Garrow and *Lawes* for the plaintiff.

Beſt, Serjeant, for the defendant.

[Attornies, *Wild* and *Magnall*.]

(*b*) 21 Jac. 1. c. 4. ſ. 1. enacts that actions for offences againſt penal ſtatutes ſhall be brought in the county, city, &c. "wherein ſuch offences ſhall be committed."

(*c*) So an action on 3 Geo. 2. c. 26. for ſelling coals as and for a ſort of coals which they really are not, muſt be brought in the county in which the coals are *delivered*, and not where they were contracted for. Butterfield q. t. v. Windle, 4 Eaſt, 385.—The moſt famous caſe in the books reſpecting the moment when an offence ſhall be taken to have been committed, is *Hales v. Petit*, Plowd. 253, where it became neceſſary to determine whether a man could be guilty of ſuicide in his own life time. Sir *James Hales* and his lady being joint tenants of a term for years, he drowned himſelf, and it was held that the term did not ſurvive to her, but was forfeited to the crown; the

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the reaſoning of BROWN, J. being conſidered irrefragable: for he ſaid, "Sir *James Hales* was "dead, and how came he to his "death? It may be anſwered, "*by drowning*; and who drown-"ed him? Sir *James Hales*. "And when did he drown him? "*In his life time*. So that Sir "*James Hales*, being alive, "cauſed Sir *James Hales* to die; "and the act of the living man "was the death of the dead "man."

Wedneſday, Auguſt 2.

REX *v.* MARTIN.

If an overſeer of the poor receive from the putative father of a baſtard child born within the pariſh, a ſum of money as a compoſition with the pariſh for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this ſum in his accounts with the pariſh.

THIS was an indictment againſt an overſeer of the poor for rendering falſe accounts.

Amongſt other inſtances of fraud, he was charged with having received 20 l. to the uſe of the pariſh, which he had not brought to account. One *Morgan* being taken up as putative father of a baſtard child born within the pariſh, had paid the defendant the ſum in queſtion by way of compoſition with the pariſh for the maintenance of the child, and the defendant had given him a written receipt for it in theſe terms. The defendant made no mention of this money in his accounts; but took credit for the expences of a journey in purſuit of *Morgan*.

Beſt, Serjeant, contended, on the authority of *Townſon* v. *Wilſon* (*a*), that the defendant was not

(*a*) 1 Camph. 396.

bound

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bound to bring this ſum to account. The contract being illegal, the whole might have been recovered back, and the defendant himſelf would have been perſonally anſwerable for it to *Morgan*, even after paying it over and going out of office. The money, therefore, was not the money of the pariſh, and the pariſh was neither defrauded nor damnified by its being omitted in the overſeers accounts.

Lord ELLENBOROUGH.—The putative father could only have recovered back ſo much of the money as was not expended upon the maintenance of the child and the lying-in of the mother. The pariſh bearing theſe expences, and being deprived of a fund legally applicable to them, was defrauded and damnified. Although the defendant would have been liable to *Morgan*, I am of opinion, that having taken the money as overſeer for the benefit of the pariſh, he was bound to bring it to account, and that he is guilty of an indictable offence by thus attempting to put it into his own pocket.

The defendant was found guilty.

Garrow, *Gurney*, and *Bolland* for the proſecutor.

Beſt, Serjeant, *Marryat*, and *Pitcairn* for the defendant.

[Attornies, *Crow* and *Dudlow*.]

Thurſday, Auguſt 10.

SCANDOVER and others *v.* WARNE.

In an action on a bail bond againſt one of the ſureties, the declaration averred, that by a writ of latitat the ſheriff was commanded to take "one *Francis* J. by the name of *John* J."—Held, that this averment was not ſupported by evidence of a latitat in the common form, commanding the ſheriff to take *John* J.; altho' the bail bond was ſigned by the principal, "Francis J. arreſted by the name of John J." and the plaintiffs offered to prove that this perſon was their debtor, whom they meant to hold to bail.

THIS was an action on a bail bond. The declaration ſtated that the plaintiffs ſued out a writ of latitat, directed to the ſheriff of Surry, "by which "ſaid writ the ſaid ſheriff was commanded to take one "*Francis* Jones by the name of *John* Jones, if he "ſhould be found in his bailiwick," &c. that the ſheriff arreſted the ſaid *Francis* Jones by the name of *John* Jones, and that thereupon the defendant became bound for the appearance of *Francis* Jones arreſted by the name of *John* Jones at the return of the writ.

Pleas; 1. *Nil debet*, to which there was a demurrer; 2. That the ſheriff was not commanded by the ſaid writ of *latitat*, in the ſaid declaration mentioned, to take the ſaid *Francis* Jones *modo & forma*, &c.; and 3. That no ſuch writ of latitat, as in the ſaid declaration mentioned, ever iſſued out of the court of our ſaid lord the king before the king himſelf, againſt the ſaid *Francis* Jones, *modo & forma*, &c. on which iſſues were joined.

An examined copy of a latitat was put in, commanding the ſheriff to take *John* Jones; and the plaintiff's counſel drew the Judge's attention to the bail bond, which was thus ſigned by the principal, "Francis Jones arreſted by the name of John Jones."

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Lawes for the defendant maintained, that both iſſues muſt be found for him, as no evidence had been given of any command to arreſt *Francis* Jones, or of any writ againſt this perſon having ever iſſued.

Marryat, *contra*, inſiſted, that it was enough if *Francis* Jones was the perſon really meant in the writ, and that this ſufficiently appeared from the bail bond; and he offered to prove that the perſon who ſigned it as principal was the real debtor to the plaintiffs, and the perſon they meant to hold to bail.

Lord ELLENBOROUGH.—The writ muſt ſpeak for itſelf. I cannot hear that inſtead of A. B. mentioned in a writ, it was meant that the ſheriff ſhould arreſt X. Y. It was lately decided that a juſtification in an action for falſe impriſonment under a writ iſſued againſt the plaintiff by a wrong name, could not be ſupported (*a*). The acknowledgement in the bail bond might be evidence againſt *Jones* himſelf; but it is immaterial to the iſſues joined on this record.

Plaintiff nonſuited.

Marryat and *Heath* for the plaintiff.

Lawes for the defendant.

(*a*) Shadgett v. Clipſon, 8 Eaſt, 328. So an officer cannot juſtify taking the goods of A. B. under a diſtringas againſt C. B. averring that A. B. and C. B. are the ſame perſon. Cole v. Hindſon, 6 T. R. 234.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

50 GEORGE III.

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FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Wednesday, Nov. 29.

LAMBERT *v.* MARTHA ATKINS and another.

In an action of debt on bond, *coverture* is a good defence under a general plea of *non eſt factum*.

DEBT on bond, dated 19th November 1808. Plea, *non eſt factum*, generally.

Garrow undertook to prove that at the execution of the bond, *Martha Atkins* was a feme covert, which fact, he contended, would entitle him to a verdict for both the defendants.

The *Attorney-General* for the plaintiff inſiſted, that *coverture* could not be given in evidence under the general plea of *non eſt factum*. Like *dureſs* and *per minas*, it muſt be pleaded ſpecially, the plea concluding

cluding *et ſic non eſt factum*. In *Com. Dig.* "Pleader," 2 W. 18. it is laid down, "if the obligor was a monk, "*feme covert*, &c. he may plead a ſpecial non eſt "factum."

Lord ELLENBOROUGH.—It is there ſaid, that the defendant *may* plead coverture ſpecially, not that it muſt be ſo pleaded. If a deed is executed by a married woman, it is abſolutely void *ab initio*; and I have always underſtood the rule to be, that what ſhews the deed to be *void* is good evidence under the plea of *non eſt factum*, and that a ſpecial plea is only neceſſary where the deed is *voidable*. I have no heſitation in this caſe in receiving evidence of the coverture.

It was then proved that in the year 1790 *Martha Atkins* was married to a man of the name of *Meredith*, who ſhortly after went abroad; but there being no ſatisfactory evidence of his being alive within ſeven years, the plaintiff had a verdict.

The *Attorney General* and *Curwood* for the plaintiff.

Garrow for the defendant.

[Attornies, *Weſt* and *Bower*.]

Anon. 12 Mod. 609. *acc.* So under *non eſt factum* the defendant may give *lunacy* in evidence, *Yates v. Boen*, Strø. 1104; or that he was made to execute the bond when *drunk*, *Cole v. Robbins*,

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bins, Bul. N. P. 172; or that it was delivered as an *eſcrow*, *Stoytes v. Pearſon*, 4 *Eſp.* 255; or, generally, any thing which proves the deed to be *void at common law* at the time of pleading, *Pigot's caſe*, 11 *Co.* 27 *a.* But although a bond be abſolutely *void by ſtatute*, as if made contrary to 23 H. 6. c. 10. or upon an uſurious conſideration, the obligor cannot take advantage of this under the general plea of *non eſt factum*, but muſt plead the ſpecial matter, *Whelpdale's caſe*, 3 *rep.* 5 *Co.* 119 a. And if one of two joint obligors, or two of three joint and ſeveral obligors be ſued, the omiſſion of the other is only matter in abatement, and no ground of nonſuit under the plea of *non eſt factum*. *Watts v. Goodman, Ld. Raym.* 1460. *Stead v. Moon*, *Cro. Jac.* 152. *Gaulton v. Challiner*, 1 *Saund.* 291 *e.*

Wedneſday, Nov. 29.

GOODTITLE ex d. PINSENT v. LAMMIMAN.

The pariſhes of A. and of B. being united by act of parliament for the maintenance of their poor, but for no other purpoſe;—it is a fatal miſdeſcription in ejectment, to ſtate premiſes which are actually within the pariſh of A. as ſituate in *the united pariſhes of* A. *and* B.

EJECTMENT for certain premiſes deſcribed in the declaration as ſituate *in the united pariſhes of St. Giles in the Fields and St. George, Bloomſbury.*

It appeared that theſe two pariſhes are united together by act of parliament for the maintaining of their poor, but for no other purpoſe; and that the premiſes in queſtion ſtand in the pariſh of *St. George, Bloomſbury.*

Wigley for the leſſor of the plaintiff contended, that a houſe ſtanding in either of the two might well be deſcribed in pleading to be in the *united pariſhes of St. Giles and St. George*, as they were united at leaſt for one very important purpoſe; and that the declaration might be conſidered as ſtating a demiſe of different

ferent premiſes, partly in the one pariſh and partly in the other, in which caſe it would be enough to ſhew that the premiſes ſought to be recovered were in either.—But,

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Lord ELLENBOROUGH held, that the variance was fatal; the declaration profeſſed to give a local deſcription of the premiſes, and ſtated them to be "in the united pariſhes of St. Giles in the Fields and St. George, Bloomſbury," as if theſe were completely blended together and formed only one pariſh; but in truth, they remained entirely diſtinct, except as to the maintenance of the poor.

Plaintiff nonſuited.

Wigley for the leſſor of the plaintiff.

Garrow and *Eſpinaſſe* for the defendant.

[Attornies, *Punter* and *Phillipſon*.]

FINCHETT, Gent. one, &c. *v.* How and JARRATT.

Wedneſday, Nov. 29.

An action for the expences of ſuing out and proſecuting a commiſſion of bankrupt till the choice of aſſignees, cannot be maintained againſt the petitioning creditor and another perſon.

ACTION for buſineſs done as ſolicitor to a commiſſion of bankrupt againſt one *John How*, ſued out by the defendant *Jarratt*, and under which both defendants were choſen aſſignees. There were items in the plaintiff's bill for other buſineſs done for the defendants on their joint retainer.

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The first question that arose was, whether the plaintiff could recover in this action for the expences which had been incurred in suing out and prosecuting the commission previous to the choice of assignees, it being enacted by stat. 5 Geo. 2. c. 30. § 25. that the creditor who shall petition for and obtain any commission of bankrupt, shall be obliged, *at his own costs and expences*, to sue forth and prosecute the same until an assignee or assignees shall be chosen of such bankrupt's estate and effects; when the commissioners are to ascertain the said costs and to direct the amount to be paid to the petitioning creditor out of the first effects of the bankrupt to be received under the commission.

Jervis for the plaintiff contended, that both the defendants might, notwithstanding the statute, be liable for these expences in the present instance, if both had retained the plaintiff to sue out and prosecute the commission, and that the object of the clause was to save the creditors from incurring any liability by proving their debts if no effects should ever be received.

But Lord ELLENBOROUGH said, the words were express that the petitioning creditor should sue out and prosecute the commission till the choice of assignees *at his own costs and expences*, and that these costs and expences, therefore, could not be recovered in a joint action against him and another person. It might be an object with the legislature to confine the solicitor entirely to the credit of the person who came forward ostensibly as petitioning creditor, and to prevent commissions from being sued out except in cases where effects

effects were likely to be recovered to defray the expence.

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Where two perſons are liable to an attorney for buſineſs done on their joint retainer, it is ſufficient for him to deliver a copy of his bill in purſuance of 2 G. 2. c. 23. to one of them, from whom he received his inſtructions and to whom the management of the buſineſs was left by the other.—*Aliter* of a delivery to that one who did not intermeddle; for he cannot be conſidered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill.

The next queſtion was, whether a copy of the bill had been delivered purſuant to ſtat. 2 Geo. 2. c. 23. § 23.

It appeared that the defendants were not co-partners; but that in all the buſineſs included in the bill *How* had taken the principal direction, and that a copy of the bill, ſigned by the plaintiff, had been delivered to him more than a month before the commencement of the action.

Park maintained that the plaintiff muſt be nonſuited, as a copy of the bill had not been delivered to each of the defendants, the words of the ſtatute being, that an action ſhall not be commenced until the expiration of one month after the attorney ſhall have delivered "to the party or *parties* to be charged therewith, or "left for him, her, or *them*, at his, her, or *their* "dwelling-houſe," a bill of his fees and diſburſements.

Lord ELLENBOROUGH.—The act does not require perſonal ſervice, and a delivery of the bill to an agent or joint contractor may be a delivery to the party or parties to be charged. If the perſon to whom the bill was delivered had not meddled with the buſineſs, though jointly liable with others who took the entire

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entire direction of it, I ſhould hold that this was no delivery as to them. But the caſe is different where the bill is delivered to the perſon authorized by the other parties to act for them. One may reaſonably ſuppoſe that he has authority to receive it, and that when received, he will communicate it to the others, and take the neceſſary meaſures for having it taxed. In the preſent inſtance, I am inclined to think that a delivery of the bill to *How* alone was a ſufficient compliance with the ſtatute (*a*).

Q. Whether an attorney can maintain an action for buſineſs done under a commiſſion of bank rupt againſt the aſſignees, one month after he has delivered a copy of his bill, but before it has been taxed by a Maſter in Chancery?

Laſtly, it was debated whether the plaintiff could recover for the buſineſs done under the commiſſion after the choice of aſſignees, as his bill had not been taxed by a maſter in chancery purſuant to ſtat. 5 Geo. 2. c. 30. § 45. (*b*)

(*a*) Vide Crowder v. Shee, 1 Campb. 437.

(*b*) Which is in theſe words, "And to the end that commiſſions of bankrupt may be carried on and proſecuted with as little expence as reaſonably may be, be it enacted by the authority aforeſaid, That all bills of fees or diſburſements claimed or demanded by any ſolicitor, clerk, or attorney employed under any commiſſion of bankrupt, ſhall be ſettled, adjuſted, and certified by one of the maſters of the court of Chancery; and ſo much as the maſter ſhall certify to be due to ſuch clerk, ſolicitor, or attorney, and no more, ſhall be paid by the aſſignee under ſuch commiſſion."

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Park inſiſted that it was imperative upon the attorney to have his bill taxed before he made any claim or demand upon the aſſignees, who are directed to pay him ſo much as the maſter in chancery ſhall certify to be due, *and no more.*

Jervis ſubmitted that the clauſe being in favour of the aſſignees, they were bound to take advantage of it, if they wiſhed to do ſo, by having the bill taxed upon their own application, which in this caſe they had had a full opportunity of doing, a copy of the bill having been delivered to them above a month before the commencement of the ſuit.

Lord ELLENBOROUGH ſaid, perhaps the meaning of the clauſe might be, that the eſtate ſhould not be charged beyond the ſum allowed by a Maſter in Chancery on taxing the ſolicitor's bill. Still, the aſſignees might have rendered themſelves perſonally liable beyond that amount. They might be compellable to pay more; but they were not to pay more *as aſſignees.* The object of the legiſlature might be only to protect the intereſts of the creditors at large, leaving thoſe who retain the ſolicitor to the common law liability ariſing from any contract they form with him, or any proceedings they may inſtruct him to inſtitute.

The amount of the bill was then referred.

Jervis and *Reader* for the plaintiff.

Park and *Lawes* for the defendant.

[Attorpies, *Finchett* and *Chippendale.*]

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

Thurſday, Nov. 30th.

DOE *v.* ROE.

When there are ſeveral counſel on the ſame ſide, and a junior has begun to examine a witneſs, the leader may interpoſe, take the witneſs into his own hands, and finiſh the examination. But after one counſel has brought his examination to a cloſe, a queſtion cannot regularly be put to the witneſs by another counſel on the ſame ſide.

IN this caſe a queſtion aroſe of conſiderable conſequence to the bar.

There were two counſel for the plaintiff. The junior having called a witneſs who ſeemed diſpoſed to ſhuffle and prevaricate, the leader interpoſed, and was proceeding to examine him.

The counſel on the oppoſite ſide contended that this was irregular, and that although where there were ſeveral counſel on the ſame ſide, they might arrange among themſelves by whom the witneſſes ſhould be examined; yet that when the examination of a witneſs was begun by one gentleman, the others had no right to put a queſtion: they might privately ſuggeſt queſtions proper to be put; but could not addreſs any directly to the witneſs: if this rule were not adhered to, a witneſs might be ſubject to the examination or croſs-examination of as many barriſters as were retained for the plaintiff or defendant, much time would be waſted, and great confuſion would be introduced into proceedings at Niſi Prius.

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Lord ELLENBOROUGH. — Convenience certainly requires that the examination of a witneſs ſhould be carried on entirely by the gentleman who begins it; and ſeveral counſel clearly cannot be permitted to put queſtions to the ſame witneſs, one after another, in the manner apprehended. But I think the leading counſel has a right, in his diſcretion, to interpoſe, and to take the examination into his own hands. Very unpleaſant conſequences might follow if this were not allowed. If a gentleman, it being his firſt appearance in a court of juſtice, ſhould be much embarraſſed in the courſe of examining a witneſs, it would be hard if it were in the power of the oppoſite party to prevent his leader from ſtepping in to his relief. And other occaſions may be imagined when it may be very important that the gentleman who conducts the cauſe ſhould have the privilege of putting queſtions to a witneſs originally called by a co-adjutor. In the preſent ſtate of the bar, there is no danger of this privilege being abuſed.

It would be curious to trace the ſteps by which the preſent mode of conducting trials at Niſi Prius, ſo well calculated for regularity, expedition, and the elucidation of truth, has been gradually eſtabliſhed. If we look back 200 years, we find all the counſel on both ſides addreſſing the jury in turn, and the rules of evidence entirely diſregarded or unknown.

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Thurſday, Nov. 30.

WARDELL *v.* FERMOR.

In an action on a poſt-obit bond, it appeared that the atteſting witneſs was an attorney who formerly had an office in London and reſided at Sydenham.—Held that it was not enough, to let in evidence of his hand-writing to prove the execution of the deed, that he had diſappeared from his office in London for a twelve-month before the trial, and had not been heard of during that period by perſons who knew him, without ſhewing that ſearch had been made after him at the houſe he occupied at Sydenham.
But evidence of his hand-writing was admitted, on proof that a twelvemonth ago, a commiſſion of bankrupt had been ſued out againſt him, to which he had never appeared.

DEBT on a poſt-obit bond.—Plea, non eſt factum.

The execution of the bond was witneſſed by *William Wrangham*, an attorney, who had an office in *Seething Lane*, and reſided with his family at *Sydenham*.

F. Williams and *Paley* for the plaintiff ſaid, they were not able to produce the atteſting witneſs, nor could they give direct evidence of his being out of the kingdom; but they undertook to ſhew that he had diſappeared, and that diligent ſearch had been made for him without effect; which they contended would be ſufficient to let in evidence of his hand-writing. In *Cunliffe* v. *Sefton*, 2 *Eaſt*, 183. which was an action of debt on bond by an adminiſtratrix, evidence being offered that diligent inquiry had been made after one of the ſubſcribing witneſſes, and that no account could be obtained of ſuch a perſon, proof was admitted of the hand-writing of the plaintiff, who was the other atteſting witneſs. The ſubſequent caſe of *Croſby* v. *Percy*, 1 *Taunt.* 364. 1 *Campb.* 303. went ſtill farther. There, evidence of the hand-writing of an atteſting witneſs to the aſſignment of a leaſe was admitted, on proof of inquiry having once been made at his uſual place of abode, when the perſon inquiring was told, that he had abſconded to avoid his creditors. MANSFIELD, C. J. ſaid the balance of convenience was in favour of extending the rule, and that more

more inconvenience would result from excluding the secondary evidence than from admitting it. Nor was this doctrine, as had been usually supposed, a modern innovation. In an *Anonymous Case*, 12 Mod. 607. which had been overlooked in the recent discussions upon this subject, Lord HOLT lays it down, that "in debt on bond, upon issue of *non est factum*, if the plaintiff prove the witnesses dead, beyond sea, *or that he has made strict inquiry after them, and cannot hear of them*, he shall be let in to prove their hands."

Lord ELLENBOROUGH.—Upon these authorities I will admit the secondary evidence, if you shew that you could not by any means find out the attesting witness. But I will watch very narrowly your proof of search. This extension of the rule may lead to dangerous consequences. If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial with an account of his having absconded.

A person who had been clerk to Mr. *Wrangham* was then called, who stated that he had disappeared about a year ago, and had not since been heard of. Another witness swore that he had repeatedly called at Mr. *Wrangham*'s late office in *Seething Lane*, without being able to learn any tidings of him. But no evidence was given of an inquiry having been made at the house he had occupied at *Sydenham*.

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Lord ELLENBOROUGH ſaid, it was poſſible he might have been ſhut up there all the time, and that his attendance might have been enforced by a ſubpœna.

The plaintiff's counſel then proved that a commiſſion of bankrupt was taken out againſt *Wrangham* as a money ſcrivener, to which he never appeared.

Wigley for the defendant ſtill inſiſted that this was inſufficient. In *Cunliffe* v. *Sefton*, proof of the adminiſtratrix's hand-writing was admitted upon the ſuppoſition that the other atteſting witneſs was a fictitious perſon. And in *Croſby* v. *Percy*, Sir JAMES MANSFIELD proceeded very much upon the particular circumſtances of that caſe, ſaying that the proof of the aſſignment was mere matter of form. But the rule could not receive the ſame extenſion in an action on a poſt obit bond, an inſtrument of a very ſuſpicious nature, and requiring to be authenticated by ſome one preſent at its execution. Nor could the proceedings under the commiſſion make any difference, as *Wrangham* might have been daily walking about the ſtreets of the metropolis, although he did not ſurrender himſelf to the commiſſioners.

Lord ELLENBOROUGH.—I am diſpoſed to treat whatever falls from the learned Chief Juſtice of the Common Pleas with the greateſt reſpect; but I do not ſee how ſecondary evidence is to be admitted or rejected according to the nature of the deed to be proved. It muſt depend upon the poſſibility of procuring the attendance of the atteſting witneſs, not upon the teſtimony he is likely to give. In this caſe,

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I think the plaintiff has now laid a ſufficient foundation for letting in evidence of the hand-writing. As *Wrangham* did not appear to his commiſſion, I muſt preſume that he was out of the kingdom. Had he been at *Sydenham* at the time fixed for his ſurrender, I muſt ſuppoſe that he would have ſurrendered to ſave himſelf from a capital felony.

The execution of the bond was then proved by evidence of *Wrangham*'s hand-writing, and the plaintiff had a verdict.

F. Williams and *Paley* for the plaintiff.

Wigley for the defendant.

[Attornies, *Vizard* and *Mills*.]

N. There was a ſuggeſtion in this caſe under 8 & 9 W. 3. c. 11. but it was conſidered quite ſuperfluous.

ADJOURNED SITTINGS AT WESTMINSTER.

1809.
Friday, Dec. 1.

POOLE *v.* BENTLEY.

If an inſtrument profeſſing to be an agreement for a leaſe, when taken altogether, appears intended to transfer poſſeſſion and a preſent intereſt in the premiſes to the tenant, it will be treated as a leaſe; although it contain a ſtipulation for ſubſequently executing a leaſe under ſeal.

THIS was an action for uſe and occupation.

The plaintiff offered in evidence *as an agreement* an inſtrument, which had an agreement ſtamp, and of which the following is a copy:

"Memorandum of agreement this 12th day of June 1806, between John Poole, Eſq. of Highbury Terrace, in the pariſh of St. Mary, Iſlington, and Peter Bentley of Pancras Lane in the city of London, Maſon, viz.

"The ſaid John Poole hereby agrees to let unto the ſaid Peter Bentley, and the ſaid Peter Bentley agrees to take of the ſaid John Poole, all that piece or parcel of land and premiſes thereon ſituate, &c. for the term of ſixty-one years from Lady-day next, at the yearly rent of one hundred and twenty pounds, free and clear of all taxes, parliamentary or parochial, except landlord's property tax, the preſent land tax being redeemed, the ſaid rent to be paid quarterly, the firſt quarter's rent within fifteen days after Michaelmas 1807; and that for and in conſideration of a leaſe to be granted by the ſaid John Poole for the ſaid term of years, the ſaid Peter Bentley agrees within the ſpace

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ſpace of four years from the date hereof to expend and lay out in five or more houſes, of a third rate or claſs of building, the ſum of 2,000l. and the ſaid John Poole agrees to grant a leaſe or leaſes of the ſaid land and premiſes as ſoon as the ſaid five houſes are covered in; and the ſaid Peter Bentley agrees to take ſuch leaſe or leaſes, and to execute a counter-part or counter-parts thereof, the ſaid John Poole to take away all the glaſs of the green-houſe, &c. This agreement to be conſidered binding, till one fully prepared can be produced.

John Poole,
Peter Bentley."

Park for the defendant objected, that this inſtrument operated as a preſent demiſe, and ought to have been ſtamped as a leaſe.

Garrow, contra, contended that the whole tenor of the inſtrument ſhewed it to be only an agreement for a leaſe—which appeared deciſively from the ſtipulation on the part of the plaintiff, to grant a leaſe or leaſes of the premiſes, and on the part of the defendant, to execute a counter-part or counter parts thereof. He relied upon Goodtitle d. Eſtwick v. Way, 1 T. R. 735. as expreſsly in point.

Lord ELLENBOROUGH.—I am of opinion that this paper paſſes a preſent intereſt in the land, and operates as a demiſe. The leaſe or leaſes afterwards to be granted are only by way of further ſecurity. Preſent poſſeſſion is given, houſes are to be built, and the agreement is to be binding till another is executed. I therefore

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cannot receive the paper in evidence, unleſs ſtamped as a leaſe.

Plaintiff nonſuited.

The caſe afterwards, came before the Court of K. B., and the Judges being all of opinion that the inſtrument was a leaſe, a rule niſi that had been granted to ſet aſide the nonſuit, was diſcharged.

Garrow and *Storks* for the plaintiff.

Park and *Reader* for the defendant.

Vide Roe v. Aſhburner, 5 T. R. 163. and Barry v. Nugent, there cited.

Saturday, Dec. 2.

HODGSON *q. t.* *v.* FLOWER.

A licenſed hawker who gives his licence to be uſed by his ſervant employed to ſell goods on his account, is not liable on 29 G. 3. c. 26. as for *letting* to *hire* or *lending* the licence.

DEBT on 29 G. 3. c. 26. ſ. 13. (*a*) to recover a penalty of 40l.

(*a*) The ſtatute enacts "that in caſe any perſon ſhall *let out to hire or lend* any licence to him or her granted as aforeſaid, or ſhall trade with, or under colour of any licence granted unto any other perſon whatſoever, or of any licence in which his or her own real name ſhall not be inſerted as the name of the perſon to whom the ſame is granted, the perſon letting out to hire or lending any ſuch licence, and the perſon ſo trading with or under colour of any licence granted to any other perſon,

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The first count of the declaration stated that the defendant, being a hawker and pedlar and petty chapman, and having a licence subscribed by two of the commissioners for the time being for licensing hawkers, dealers, and petty chapmen, granted to him to travel and trade with two horses from town to town, &c. did unlawfully *let out to hire and lend* the said licence so to him granted, to wit, to one *Benjamin Worby*, the term for which the same was granted not being expired; contrary, &c. The second count alleged that the defendant did unlawfully *lend* the licence.

It appeared that the defendant is a coal merchant in St. Catherine's near the Tower, and that he was in the habit of employing *Worby* as his servant to sell coals about the streets from a waggon having his (defendant's) name painted upon it, and drawn by his horses. *Worby* received a commission of 4s. 6d. a chaldron upon the coals he sold; and such as he could not dispose of, he brought back to the defendant. If he gave credit to any purchaser, it was at his own risk, as he was always obliged to pay, upon his return home, for all that were sold. Upon these occasions *Worby* carried about with him a licence, which his master had taken out in his own name, and had delivered to him for the purpose of protecting him.

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person, or any licence in which his or her own real name shall not be inserted as the name of the person to whom the same is granted, shall each of them forfeit the sum of 40l. to be recovered," &c.

The

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The *Attorney General* inſiſted that the defendant had incurred the penalty by thus handing over his licence to *Worby*. The object of the ſtatute was, to prevent any perſon from having the opportunities of committing robbery and fraud enjoyed by hawkers and pedlars whoſe character had not been inveſtigated and vouched for. This appeared clearly from the ſixth ſection, which enacts, that before any perſon ſhall be entitled to receive any licence to trade or travel as a hawker or pedlar, he ſhall produce to the commiſſioners a certificate ſigned by ſome one clergyman officiating within the pariſh or place within which he has his uſual place of reſidence, and alſo by two reputable inhabitants of the ſaid pariſh or place, atteſting that he is of good character and reputation, and is a fit perſon to be licenſed to exerciſe the trade of a hawker, pedlar, and petty chapman. But this clauſe would be rendered entirely nugatory if a man, under colour of licences granted in his own name, could ſend out his ſervants, who might be men of the moſt infamous character. The licence was perſonal, and could only be uſed by the perſon to whom it was granted.

Garrow, contra, maintained that the act went no farther than to forbid the lending or letting to hire of a licence, to be uſed by another as a ſeparate trader, and for his own advantage. *Worby* here repreſented the defendant, and the licence might be conſidered as having been all the while in the defendant's poſſeſſion. If the perſon to whom a licence was granted ſhould be taken ill, could it be contended that he might not ſend

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ſend out his ſervant with his cart and horſes to ſell his goods until his recovery? The meaning of the legiſlature could not be that the hawker ſhould be chained like the drag-ſtaff to his cart. There was a ſufficient ſecurity for the ſervants in the character of the maſter, and he was reſponſible for their acts.

Lord ELLENBOROUGH.—The declaration ſtates that the defendant *let* the licence to hire, and that he *lent* it. We muſt, therefore, conſider whether he did either the one or the other; not whether what he actually has done ought or ought not to have been prohibited by the legiſlature. It appears to me, that in ſending out his ſervant to ſell coals with the licence, he neither let it to hire nor lent it. He cannot be ſaid to have let it to hire, having received no hire or reward for parting with it. *Worby*, inſtead of hiring, was himſelf hired. Nor can this be conſidered a lending. Lending may be defined a gratuitous bailment of a chattel to be uſed for the benefit of the perſon to whom it is delivered. Here, the ſuppoſed borrower does not derive the benefit ariſing from the uſe of the licence, The coals were ſold on the defendant's account, and he received the profits of the ſale. *Worby*'s commiſſion can only be conſidered as the wages of his labour. Perhaps the licence was no protection to him, and in that caſe he might have been himſelf proſecuted for trading as a hawker, without, or under colour of, a licence: but I clearly think that no forfeiture has been incurred by the defendant. The certificate certainly looks as if the legiſlature had meant that the

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the licence ſhould be perſonal; but this conjecture cannot extend a penal ſtatute beyond the limits pointed out by the enacting clauſe, or render a delivery of the licence to be uſed for the benefit of the owner, a lending or letting to hire. From a communication I have had with the CHIEF BARON of the Exchequer, I find that a caſe like the preſent occurred a few years ago in that Court (*a*). It having been ruled at Niſi Prius that the action could not be maintained for ſending out a ſervant with the licence, a new trial was moved for; but the BARONS were all of opinion that the caſe did not come within the act of parliament. I ſhould hold myſelf bound here by that authority; and it perfectly correſponds with my own opinion.

Plaintiff nonſuited.

The *Attorney-General* and *Gurney* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Ledwick* and *Weſt*.]

(*a*) Chamberlain q. t. v. Hill, H. T. 44 G. 3.

EVANS q. t. *v.* HUNTER.

Monday, December 4.

In an action on 5 Eliz. for ſetting to work a journeyman who has not ſerved an apprenticeſhip, the plaintiff cannot recover any penalty that had been incurred a year before the commencement of the ſuit, although the defendant continued to employ the ſame journeyman within the year.

DEBT on 5 Eliz. to recover 30 l. which the declaration alleged the defendant had forfeited by employing in the buſineſs of a carpenter for 15 months from the 18th day of May 1808, one J. H. who had not ſerved an apprenticeſhip to the ſaid trade. Plea, *nil debet.*

It appeared that the defendant had employed J. H. in the manner alleged, from the 18th of May 1808 to the 15th of September 1809. The declaration was entitled generally of Michaelmas Term, 50 Geo. III. and the writ was not given in evidence.

Jervis for the defendant contended, that his client could not be liable in this action for employing the journeyman before the 6th of November 1808. The ſtatute impoſed a penalty of 40 *s.* a month for ſetting to work a perſon who had not ſerved an apprenticeſhip. Therefore each month that this was done conſtituted a diſtinct offence, and by 31 Eliz. c. 5. § 5. all actions brought for any forfeiture upon a penal ſtatute, the benefit whereof is limited to the king and the proſecutor, muſt be brought within one year after the offence is committed.

It was ſuggeſted on the other ſide, that the employment of this perſon from June 1808 to September 1809, was a continued act, and that the ſtatute therefore

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fore did not begin to run till the 15th of September 1809.—But

Lord ELLENBOROUGH ſaid the ſtatute was a bar to all the penalties that had accrued before 6th November 1808, and the plaintiff had a verdict for thoſe that accrued ſubſequently.

Garrow and *Lawes* for the plaintiff.

Jervis for the defendant.

[Attornies, *Chippendale* and *Fielder*.]

It is, perhaps, fortunate that there is not much inducement from pecuniary conſiderations to bring an action on this ſtatute, as the plaintiff cannot recover for his own uſe more than 12 l. and he muſt pay his own coſts.

Wedneſday, December 6.

WATSON *v.* PEARS.

A patent, dated 10th May, contained a proviſo that a ſpecification ſhould be inrolled within one calendar month next and immediately after the date thereof. The ſpecification was inrolled on the 10th of June following.—Held that the month did not begin to run till the day after the date of the patent, and that the ſpecification was in time.

THIS was an action on the caſe for the infringement of a patent.

The patent bore date 10th May 1808, and contained the uſual proviſo, that a ſpecification ſhould be inrolled "within one calendar month next and immediately

"after the date thereof."—The ſpecification was not inrolled till the 10th of June following.

Park for the defendant inſiſted that the patent was void, the ſpecification not having been inrolled on or before the 9th of June, when one calendar month from the date of the patent expired. The month muſt begin to run from the 10th of May, and included the whole of that day. It therefore could not extend to the 10th of June, there being a clear impoſſibility of two days of the ſame number being comprehended in one calendar month.

Selwyn, contra, relied upon Thomas v. Popham, M. 4 Eliz. Dyer, 218 b. Moore, 40. S. C. The queſtion aroſe there upon the ſtatute of inrolments, 27 H. 8. c. 16. which enacts "that the inrolment ſhall be "made *within ſix months next after the date of the deed.*" The indenture in iſſue bore date, 9th October 1557; it was inrolled in chancery on the 21ſt of March 1558, which was the laſt day of the ſix months, reckoning 28 days to each month, and making the day of the date *excluſive*. The COURT held, that the indenture was well inrolled; and that the words "next after the date of the deed" were excluſive of the day of the date.

Park, in reply, urged, that in that caſe the Court was bound, if poſſible, to ſupport the validity of the deed againſt the grantor, who was a ſubject; but that the grant here being by the king, was liable to a different rule of conſtruction, and that it had been often decided

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WATSON v. FEARS.

decided that where a period was to be reckoned from a date, the day of the date was inclusive.

Lord ELLENBOROUGH.—It used to be held that "from the date," includes the day, and "from the "day of the date," excludes it. But since the case of *Pugh* v. *The Duke of Leeds* (*a*), these formal distinctions have been done away; and the rule of good sense has been established, that such words shall be construed according to the meaning of the parties who use them. The case cited upon the statute of inrolments I think is expressly in point. That shews that the day on which the patent bears date is not to be reckoned. The month therefore only began on the 11th of May, and included the 10th of June, the day on which the specification was inrolled.

The defendant afterwards had a verdict on the merits.

Garrow and *Selwyn* for the plaintiff.

Park and *Comyn* for the defendant.

[Attornies, *Sloper* and *Hamilton*.]

(*a*) Cowp. 714.
But where the computation of time is to be made from an *act done*, the day on which the act is done is to be *included* in the reckoning. Castle v. Burditt, 3 T. R. 623. Glassington v. Rawlins, 3 East, 407.

TAUNTON *v.* WYBORN, Esq.

Friday, December 8.

THIS was an action for criminal conversation.

In an action for crim. con. if the plaintiff's marriage was solemnized in a chapel, he must give some evidence that banns were usually published there before the passing of the marriage act. But it is *prima facie* sufficient for this purpose, to produce an old register of marriages solemnized in the chapel before the passing of the marriage act, and a regular register of banns published there since, and to prove that, within the recollection of witnesses who have attended the chapel, marriages have been solemnized and banns published in it from time to time of late years.

To prove the marriage between the plaintiff and his wife, a clergyman was called, who swore that he had performed the ceremony in the *Chapel Royal* in the TOWER of LONDON; and a copy of the register was put in, stating the parties to have been married there in the year 1804. But this clergyman, who belonged to a distant parish, did not know whether marriages had been usually solemnized, and banns proclaimed in the chapel in question; and, at first, no register of marriages or banns was produced.

Park for the defendant objected, that the plaintiff's marriage appeared to be invalid under stat. 26 G. 2. c. 33. which enacts, that all marriages solemnized in any other place than a church or public chapel where banns have been usually published, unless by special licence from the Archbishop of Canterbury, shall be void. No evidence being given of the publication of banns in this chapel, the Judge must presume, that it was like the chapel in the *Savoy*, or the chapels in the *Inns of Court*, in which banns had not been usually published before the passing of the marriage act, and in which marriages cannot now be legally solemnized.

Lord ELLENBOROUGH seemed to consider the objection as well founded; but said he would allow the

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trial to proceed, so that the plaintiff might in the mean time send to the Tower of London to make inquiries concerning this chapel.

Some time after, the parson attended who regularly officiates there, and produced a register of marriages, going back to the year 1578, and a register of the publication of banns from the year 1754, when the marriage act passed. He likewise stated, that while he had known the chapel, marriages had been frequently performed in it, and banns proclaimed.

Park still objected, that the evidence was insufficient; as notwithstanding any thing that had been proved, banns might never have been proclaimed in this chapel before the passing of the act.

Lord ELLENBOROUGH.—As banns appear to have been frequently published here ever since the passing of the marriage-act, I will presume that they were so before. The register produced begins with the year 1754; but this circumstance is accounted for by its being necessary then to begin a new register of this sort according to the form prescribed by the statute. Banns were most probably published previously, and entered in a different register, or perhaps not registered at all. Sufficient evidence is now adduced to found the presumption. However, I consider this only as a *prima facie* case; and I am ready to receive evidence, that before the passing of 26 G. 2. c. 33. banns were not usually proclaimed in this chapel. In cases of this sort, where the marriage has been solemnized in a chapel, I hope the plaintiff will come prepared with the

the regiſters and other evidence to ſhew that banns are now, and have been uſually, publiſhed there. Without ſome foundation of this ſort, I cannot form any preſumption that it is a chapel in which marriages may be lawfully ſolemnized according to the proviſions of the marriage act.

The plaintiff had a verdict.

The *Attorney General*, *Garrow*, and *Dampier* for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Blake* and *Platt*.]

In *Rex* v. *Northfield*, *Doug.* 658. the court of K. B. determined that by "a public chapel in which banns have been uſually publiſhed," the legiſlature meant a chapel exiſting at the time when the marriage-act paſſed, and in which banns had then been uſually publiſhed; and conſequently, that a marriage ſolemnized in a chapel erected ſince 26 G. 2. is void, although banns have been frequently publiſhed and marriages *de facto* ſolemnized there from the time of its erection. But as many marriages, from ignorance and inadvertence, had been ſolemnized in ſuch chapels, acts have from time to time been paſſed to render them valid under certain reſtrictions, and to exempt the officiating clergymen from the penalties they had incurred. See 21 G. 3. c. 53. 44 G. 3. c. 77. and 48 G. 3. c. 127.

ADJOURNED SITTINGS IN LONDON.

Tuesday, Dec. 12.

WILLIAMS *v.* STEVENS.

A man is not a trader within the meaning of the bankrupt laws by building a public theatre to be held in shares, for which he was to be paid according to measure and value, he himself being proprietor of several shares;—nor by erecting public baths on ground of which he was joint tenant in fee.

THIS was an issue directed by the Lord Chancellor to try, whether the plaintiff was a bankrupt on the 2d November 1804; which depended upon the question, whether he had previously been a *trader* within the meaning of the bankrupt laws.

The affirmative was contended from the plaintiff's having erected a public theatre and baths at *Southend*.—It appeared that by an agreement between him and several other persons for building a theatre at this place, it was to be held in shares, whereof the plaintiff was to have nine; that he was to find the materials and erect the building; and that he was to be paid for it by measure and value. This agreement was carried into execution.—The plaintiff likewise erected the baths; but he was joint tenant in fee of the spot where they stood, which had been granted to him and another person for this purpose by the lord of the manor.

Lord ELLENBOROUGH ruled, that *Williams* was not within the bankrupt laws by reason of either of these transactions, and said, that a building on a man's own land,

land, for whatever purpoſe, could not be conſidered a buying and ſelling.

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Verdict for the defendant (*a*).

One of the witneſſes being examined on the *voire dire*, appeared to have a conſiderable demand upon the plaintiff for goods ſold, which he had not proved under the commiſſion.

A creditor of a bankrupt who has not proved his debt under the commiſſion, is a competent witneſs to ſupport the commiſſion, although not to increaſe the eſtate.

It was contended that this was an incompetent witneſs; as he came to ſupport the commiſſion, under which he was to receive a dividend.

Lord ELLENBOROUGH.—A creditor is clearly an incompetent witneſs to increaſe the fund out of which he may receive a dividend; but I do not ſee why he ſhould not be allowed to prove what barely goes to ſupport the commiſſion, of which he has not availed himſelf. It may be quite as advantageous for him to be allowed to ſue his debtor as a ſolvent perſon, as to

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(*a*) See all the caſes upon this ſubject, collected in *Sutton v. Weeley*, 7 Eaſt, 442. in which it was at laſt ſettled, that the proprietor of a brick ground making bricks there for ſale, with a view to profit, is not a trader within the bankrupt laws, although he purchaſes the fuel uſed in burning the bricks.

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receive a dividend under a commiſſion of bankrupt ſued out againſt him.

The witneſs was examined (*b*).

Garrow and *Marryat* for the plaintiff.

The *Attorney-General* and *Lawes* for the defendant.

[Attornies *Dixon* and *Unwin*.]

(*b*) A creditor without having proved his debt under the commiſſion, is incompetent to give evidence to deprive the bankrupt of his allowance, and thereby to increaſe the dividend, Shuttleworth v. Bravo, Stra. 507. But a creditor who has ſold his debt, after proving it, is a competent witneſs to ſupport the commiſſion, his intereſt being gone. Granger v. Furlong, 2 Sir Wm. Bl. Rep. 1273. And in all caſes, the incompetency of the creditor may be removed, by his releaſing the aſſignees, without a releaſe to the bankrupt. Ambroſe v. Clendon, Caſ. Temp. Hardw. 267. Koopes v. Chapman, Peak. Caſ. 19.

Wednesday, Dec. 13.

GUIDON *v.* MARY ROBSON.

A merchant carrying on trade on his own ſeparate account, introduces into his *firm* the name of a clerk who has no participation in profits or loſs, but continues to receive a fixed ſalary. *Held* that in an action on a bill of exchange payable to the order of this *firm*, the clerk muſt be joined as a plaintiff.

ACTION by the drawer and payee of a bill of exchange againſt the acceptor.

The declaration ſtated that the plaintiff drew the bill by the name, ſtile, and firm of *Guidon and Hughes*.

It

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It appeared that the plaintiff traded under the firm of *Guidon and Hughes*, mentioned in the bill; that he has no partner who participates in the profits of his buſineſs; but that he has a clerk of the name of *Hughes*, at a fixed ſalary, who is held out to the world as his partner, and is generally conſidered as ſuch.

The *Attorney General* contended that *Hughes* ought to have been joined as a partner in this action. The defendant contracted, not with the plaintiff ſingly, but jointly with him and *Hughes*. She came prepared to ſhew that ſhe never accepted any bill drawn individually by *Guidon*. She might have a good defence to an action on a bill drawn by the partnerſhip; but ſhe had no reaſon to imagine that the bill declared upon was of that deſcription. Suppoſe ſhe had a debt due to her from the firm, how could ſhe ſet it off in this action? Payment to *Hughes* would clearly have been a good ſatisfaction of the bill; and a releaſe from him would have extinguiſhed the debt. He was liable to *Guidon*'s creditors; and as to all thoſe who dealt with *Guidon*, he was a contracting party as much as if there had been an equal participation of profit and loſs between the two.

Park, *contrà*, inſiſted that the caſe ſtood exactly the ſame as if there had been no ſuch perſon as *Hughes in rerum naturâ*. The names in a firm are quite immaterial. Firms ſometimes continue unchanged for generations, and when the names of the real partners no longer correſpond with any of thoſe oſtenſibly uſed. Perſons who deal with the firm, therefore,

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contract only with those really composing the partnership. It is very common for men, trading by themselves to add *& Co.* to their names, and if instead, they added the name of another person who had no share in the business, the legal effect must be the same. The plaintiff alone had the beneficial interest in the bill, and he had, therefore, a right to sue upon it by himself. The defendant was not injured. The declaration gave her full notice of the bill on which the action was brought, and if she had a set off, she might give it in evidence.

Lord ELLENBOROUGH.—There being such a person as *Hughes*, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm, for the purpose of gaining credit. But where the name of a real person is inserted, with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case, the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person. The variance is fatal.

Plaintiff nonsuited.

Park

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Park and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Dewes* and *Pierce*.]

Vide Waugh v. Carver, 2 H. Bl. 235. Peacock v. Peacock, ante 45.

JONES and another *v.* MARS and another.

Thurſday, Dec. 14.

INDORSEES againſt drawers of a bill of exchange.

In an action againſt the drawer of a bill of exchange, the declaration ſtated, that the defendants made the bill, "their own proper *hands* being thereunto ſubſcribed." In fact, their firm of "A. & Co." was ſubſcribed to the bill.—The Judge refuſed to nonſuit for the variance.

The declaration ſtated that the defendants "made their certain bill of exchange in writing, their own proper *hands* being thereunto ſubſcribed."

The bill when produced appeared to be drawn in the defendant's firm of "*Mars & Co.*"

Lawes objected that this was a fatal variance. It would have been enough if the declaration had alleged that the defendants drew the bill according to the cuſtom of merchants, or it might have added "by the ſtile and firm of *Mars & Co.*" or "the ſtile and firm of *Mars & Co.* being thereunto ſubſcribed." But to ſupport the declaration as actually framed, it would

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would be neceſſary to produce a bill ſigned by both the defendants as drawers. Bills muſt be ſo drawn, if there are two drawers who are not in co-partnerſhip (*a*), and the bill declared upon muſt be taken to be of this deſcription. This was like a caſe before his Lordſhip two or three years ago, where, in an action againſt the drawer of a bill of exchange, the declaration ſtated that the defendant's *own proper hand* was thereunto ſubſcribed, and it turned out that the bill was drawn by *procuration*; whereupon the plaintiff was nonſuited.

Lord ELLENBOROUGH.—It was impoſſible to ſay that the hand of the agent who ſigned the bill by procuration was the principal's own proper hand. But here the proper hand of one of the defendants is ſubſcribed to the bill. The only difficulty is, that the word is in the plural. Had it been "their own proper *hand*," I ſhould have clearly held it ſufficient. As it ſtands, I entertain ſome doubt; but I will not nonſuit. Perhaps the *s* may be rejected as ſurpluſage, or part may have been written with one hand and part with another. The defendant could not have been led into any miſtake as to the bill ſued upon.

A bill of exchange expreſſed on the face of it to be "*for value delivered*," is ſtated in pleading to be "for value received." This is not a material variance.

The bill was ſtated on the declaration to be "for value *received* in leather." On the face of it, the bill was expreſſed to be "for value *delivered* in leather." An objection being taken on this point,

(*a*) Carrick v. Vickery, Doug. 653.

Lord

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Lord ELLENBOROUGH said, if the leather was delivered by one party, it was received by the other, and that the real meaning of both phrases being the same, the variance was immaterial.

The plaintiffs had a verdict, which was acquiesced in.

Park and *Espinasse* for the plaintiffs.

Lawes for the defendants.

[Attornies, *Bugby* and *Kirkman*.]

If a declaration states that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that date, the day in the declaration is immaterial, though not under a videlicet.

Coxon v. Lyon. York Lent Assizes 1810. COL. THOMPSON, B.—Action against the drawer of a bill of exchange. The first count of the declaration stated, "that defendant, on the 3d day of Feb. 1810, at, &c. according to the usage and custom of merchants, made his certain bill of exchange in writing, his own proper hand, &c. and then and there directed the said bill of exchange to one W. H.; by which said bill of exchange defendant then and there requested the said W. H. to pay to plaintiff on the 1st day of August 1809, the sum of 400l.

The bill being produced appeared to be dated *6th Feb.* 1810.

Topping and *Hullock* for the defendant contended, that this was a fatal variance.

Holroyd, contra. The declaration does not allege the date as part of the bill; but only alleges that defendant on that day drew the bill, being silent as to the date of it.

THOMPSON, B. for this reason was of opinion that the date of the bill being different from the day in the declaration, was not a material variance.

Topping and *Hullock* then insisted that as the day of drawing the bill was alleged as a

substantial

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ſubſtantial averment, not being laid under a videlicet, the plaintiff was bound to prove the actual day, eſpecially as the bill itſelf ſhewed a different day. But

THOMPSON, B. ruled, that the allegation of the day was immaterial, though without a videlicet, and that it was enough for the plaintiff to prove the bill.

But in a caſe before Lord ELLENBOROUGH at the ſitting after M. T. 1809. where the declaration alleged that the defendant on, &c. made his certain bill of exchange in writing *bearing date the ſame day and year aforeſaid*, and the real date of the bill was different, his Lordſhip held the variance to be fatal, and nonſuited the plaintiff.

Thurſday, Dec. 14.

SIFFKIN *v.* WALKER and ROWLESTONE.

If a promiſſory note appears on the face of it to be the ſeparate note of A. only, it cannot be declared on as the joint note of A. & B. though given to ſecure a debt for which A. & B were jointly liable.

ACTION on a promiſſory note in the following form:

"Two months after date I promiſe to pay J. Siffkin or order 300l. for value received.

Thos. Walker."

The declaration ſtated that the defendants made their certain promiſſory note, which was ſigned by Walker for himſelf and Rowleſtone, whereby they promiſed to pay, &c.

Park, in opening the caſe, undertook to ſhew that the defendants were jointly indebted to the plaintiff on a charter party of affreightment, to the amount of

2 300l.

300l. and that the note declared upon was given by Walker in satisfaction of this debt.

Lord ELLENBOROUGH.—I think your remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note. How can I say that a note made and signed by one in his own name is the note of him and another person neither mentioned nor referred to?

Park contended that the note was set out in the declaration according to its import and legal effect; that Walker had authority to bind Rowlestone for this debt, and that the presumption of law was that he had done so, although Rowlestone's name was not introduced. It was universally acknowledged that any number of partners might be bound by a note drawn in the partnership firm; and the legal consequence must be the same if a note be given for a partnership debt, whether the phrase *& Co.* be employed or not.

Lord ELLENBOROUGH.—The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt.

Plaintiff nonsuited.

Park and *Holroyd* for the plaintiff.

The *Attorney-General* for the defendant.

[Attornies, *Getty* and *Sweet*.]

Vide Mason v. Rumsey, 1 Campb. 384. Lord Galway v. Matthew, *Ib.* 403.

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Thursday, Dec. 14.

LEGGE v. THORPE.

If the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reasonable grounds to expect that the bill would be honoured, a protest is unnecessary to charge the drawer.

THIS was an action by the plaintiff as indorsee of a foreign bill of exchange drawn by the defendant in Canada, upon *C. B. Wyatt* in this country.

The plaintiff gave the usual evidence in support of such an action, except the *protest*. To obviate the necessity of this, *Wyatt* was called, and swore that he had no effects of the defendant in his hands, and that the defendant had no right to expect that upon any consideration he would accept or pay the bill.

Park for the defendant insisted that the rule was peremptory and universal, which required that there should be a protest, in the case of a foreign bill, to charge the drawer, and that for want of this the plaintiff must be nonsuited.

Garrow, contra, maintained that a protest was merely the mode of giving notice in the case of foreign bills, and was altogether unnecessary where no notice was required.

Park distinguished between inland and foreign bills, and contended that the latter must be guided by the general law of merchants upon the subject received in other countries; according to which, a protest is invariably required to charge the drawer.

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Lord ELLENBOROUGH regretted that notice had ever been dispensed with in any case; but said he did not see how it was more necessary in the case of foreign than of inland bills; and if *notice* was unnecessary, so was a *protest*, which was only the formal mode of giving notice to the drawer and indorsers of foreign bills. The protest could not be considered an essential part of the custom of merchants upon this subject. There might be cases where although the drawee had no effects of the drawer in his hands when the bill was presented for acceptance or payment, the drawer of a foreign bill might notwithstanding be entitled to notice, and where a protest would in consequence be requisite; as if a bill were drawn in respect of consignments sent to the drawee, or on the credit of any fund which might reasonably be expected to prove available. But here the drawer knew from the beginning that the bill would be dishonoured, and no detriment could happen to him from being left ignorant of the precise date of its dishonour. His Lordship however expressed a wish, that as the point was of great importance, the opinion of the court should be taken upon it.

Accordingly a verdict was entered for the plaintiff; and in the ensuing term a rule was granted to shew cause why a nonsuit should not be entered; but cause being shewn, the rule was discharged, the whole court being of opinion that as the defendant had no right to expect that the bill would be honoured by the drawee,

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drawee, he was not entitled to notice, and that a protest was therefore unneceſſary.

Garrow and *F. Pollock* for the plaintiff.

Park and *D. Pollock* for the defendant.

[Attornies, *Wild jun.* and *Taylor.*]

Vide Bickerdike v. Bollman, 1 T. R. 405. Rogers v. Stephens, 2 T. R. 713. Gibbon v. Coggon, *ante* 188.

Thurſday, Dec. 14.

TAMPLIN AND ANOTHER, Aſſignees of VISICK a Bankrupt, *v.* DIGGINS and ANOTHER.

Bankers having accepted bills for the accommodation of a trader, he, after committing an act of bankruptcy, but before a commiſſion is ſued out, lodges money with them to take up the bills, which do not become due till after a commiſſion is ſued out, and are then regularly paid by the acceptors.—Held that they were bound to refund this money to the aſſignees, and that they neither had a right of ſet off under 5 G. 2. c. 30.; nor could protect themſelves under 19 G. 2. c. 32. as having received the money in payment of bills of exchange in the ordinary courſe of trade.

ACTION for money had and received, to recover the ſum of 324l. paid by *Viſick* to the defendants after an act of bankruptcy.

The defendants are bankers at *Chicheſter*, and were in the habit of drawing bills for the accommodation of *Viſick* who carried on buſineſs at *Midhurſt*. He committed an act of bankruptcy on the 18th of Aug. 1808. At that time there were bills running of the nature above mentioned, which were not due till after the

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the 24th of September. On the latter day a commiſſion of bankrupt was ſued out againſt *Viſick*. The money in queſtion was paid in by him on and after the 24th of Auguſt, for the purpoſe of taking up theſe bills, which have ſince been paid by the defendants.

Garrow contended firſt, that the defendants had a right of ſet off under 5 G. 2. c. 30. ſ. 28. which enacts that where there ſhall appear to have been mutual credit given by the bankrupt and any other perſon, or mutual debts between the bankrupt and any other perſon, one debt may be ſet againſt the other, and what ſhall appear to be due on either ſide on balance of ſuch account, and no more, ſhall be claimed or paid reſpectively. Here were mutual debts, and there had been a long courſe of mutual credit. But upon taking an account, the balance was in favour of the defendants. The action, therefore, could not be maintained.

Lord ELLENBOROUGH.—The money not being paid in till after an act of bankruptcy, it was not the bankrupt's money, but the money of his aſſignees. He truſted the defendants with what was not his own. The ſtatute is expreſsly confined to mutual credit and mutual debts *at any time before ſuch perſon became bankrupt*. The 324l. was always a debt due to the aſſignees, and cannot be ſet off againſt a debt due from the bankrupt.

Garrow next claimed to retain this ſum of money under 19 G. 2. c. 32. ſ. 1. whereby it is enacted

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"that no person who shall be really and *bona fide* a creditor of any bankrupt for or in respect of any bill or bills of exchange really and *bona fide* drawn, negociated, or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignees of such bankrupt's estate any money, which before suing forth the commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand or have notice, that he is become a bankrupt, or that he is in insolvent circumstances." The defendants in this case clearly were the *bona fide* creditors of the bankrupt in respect of bills drawn in the usual course of dealing between the parties, and as they had received the money before the date of the commission, and before they had notice of *Visick* having committed an act of bankruptcy or being insolvent, they could not be liable to refund it to the assignees.

Lord ELLENBOROUGH.—I doubt whether these bills can be said to have been drawn in the usual course of trade and dealing within the meaning of the statute. At any rate, as the bills were still running at the date of the commission, this money was not received by the defendants in the usual and ordinary course of trade and dealing. The payments protected, are payments upon bills actually due. The sum in question was deposited with the defendants, not in payment of a present debt, but to satisfy a demand which

which did not arise till after the suing forth of the commission.

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Verdict for the plaintiffs, which was afterwards confirmed by the Court of K. B.

Gurney and *Runnington* for the plaintiffs.

Garrow and *Taddy* for the defendants.

[Attornies, *Russell* and *Ellis*.]

Vide Vernon v. Hall, 2 T. R. 648. Pinkerton v. Marshall, 2 H. Bl. 334. Bradley v. Clarke, 5 T. R. 197.

Stat. 19, G. 2. c. 32. can now come in question only where the payment is *within two months* of the suing out of the commission, Sir S. Romilly's Act, 46 G. 3. c. 135. § 1. having rendered valid and effectual, notwithstanding any secret act of bankruptcy, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt, bona fide made or entered into *more than two calendar months* before the date of the commission.

BOWMAN *v.* MANZELMAN.

Saturday, Dec. 16.

ACTION for seaman's wages.

In an action for seaman's wages, the plaintiff may under 2 G. 2. c. 36. give evidence of the contents of the ship's articles, without having served a notice to produce them.

It appeared that the defendant had agreed to pay the plaintiff 7*l*. a month; but that there were ship's articles, which the plaintiff afterwards signed.

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It being objected that the articles ſhould be produced, ſtatute 2 Geo. 2. c. 36. ſ. 8. was cited, whereby it is enacted, that "no ſeaman or mariner, by entering into or ſigning ſuch contract or agreement ſhall be deprived of, or hindered from uſing any means or methods for the recovering of wages againſt any ſhip, the maſter or owners thereof, which he may now lawfully make uſe of, and that in all caſes where it ſhall or may be neceſſary that the contract or agreement in writing ſhould be produced in court, no obligation ſhall lie on any ſeaman or mariner to produce the ſame, but on the maſter, owner or owners of the ſhip, for which the wages ſhall be demanded; and no ſeaman or mariner ſhall fail in any ſuit, action, or proceſs for recovery of wages for want of ſuch agreement or contract being produced, &c."

The defendant's counſel ſtill inſiſted, that according to the invariable rule of law, the mariner was bound to give the captain notice to produce the articles before entering into parol evidence of their contents, and that the object of the legiſlature muſt be underſtood to have been, to impoſe the obligation of producing them upon the captain or owners, after receiving ſuch notice, in whoſe cuſtody ſoever they might be.—But,

Lord ELLENBOROUGH held, that the ſtatute introduced an exception to the general rule upon this ſubject; and required the captain, without notice, to produce the articles at the trial, if he would found any objection

objection upon them, or reſort to them for any purpoſe whatever in making his defence.

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The plaintiff had a verdict without the articles being produced.

The *Attorney General*, *Park*, and *Eſpinaſſe* for the plaintiff.

Garrow and *Wigley* for the defendant.

[Attornies, *Rippingham* and *Willett*.]

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2 G. 2. c. 36. § 1. requires that the agreement for ſeamens' wages ſhall be in writing, and this written document is neceſſarily in the cuſtody of the maſter or owners of the ſhip. See Abbott on Shipping, Part IV. c. 1.

STILK *v.* MYRICK.

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THIS was an action for ſeaman's wages, on a voyage from London to the Baltic and back.

In the courſe of a voyage ſome of the ſeamen deſert, and the captain not being able to find others to ſupply their place, promiſes to divide the wages which would have become due to them among the remainder of the crew. This promiſe is void for want of conſideration.

By the ſhip's articles, executed before the commencement of the voyage, the plaintiff was to be paid

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at the rate of 5 l. a month; and the principal queſtion in the cauſe was, whether he was entitled to a higher rate of wages.—In the courſe of the voyage, two of the ſeamen deſerted, and the captain having in vain attempted to ſupply their places at *Cronſtadt*, there entered into an agreement with the reſt of the crew, that they ſhould have the wages of the two who had deſerted equally divided among them, if he could not procure two other hands at *Gottenburgh*. This was found impoſſible; and the ſhip was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at *Cronſtadt*.

Garrow for the defendant inſiſted, that this agreement was contrary to public policy and utterly void. In Weſt India voyages, crews are often thinned greatly by death and deſertion; and if a promiſe of advanced wages were valid, exorbitant claims would be ſet up on all ſuch occaſions. This ground was ſtrongly taken by Lord KENYON in *Harris v. Watſon*, *Peak. Caſ.* 72. where that learned judge held, that no action would lie at the ſuit of a ſailor on a promiſe of the captain to pay him extra wages, in conſideration of his doing more than the ordinary ſhare of duty in navigating the ſhip; and his lordſhip ſaid, that if ſuch a promiſe could be enforced, ſailors would in many caſes ſuffer a ſhip to ſink unleſs the captain would accede to any extravagant demand they might think proper to make.

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The *Attorney General, contra,* diſtinguiſhed this caſe from *Harris v. Watſon,* as the agreement here was made on ſhore, when there was no danger or preſſing emergency, and when the captain could not be ſuppoſed to be under any conſtraint or apprehenſion. The mariners were not to be permitted on any ſudden danger to force conceſſions from the captain; but why ſhould they be deprived of the compenſation he voluntarily offers them in perfect ſecurity for their extra labour during the remainder of the voyage?

Lord ELLENBORGUGH.—I think *Harris v. Watſon* was rightly decided; but I doubt whether the ground of public policy, upon which Lord KENYON is ſtated to have proceeded, be the true principle on which the deciſion is to be ſupported. Here, I ſay the agreement is void for want of conſideration. There was no conſideration for the ulterior pay promiſed to the mariners who remained with the ſhip. Before they ſailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had ſold all their ſervices till the voyage ſhould be completed. If they had been at liberty to quit the veſſel at *Cronſtadt,* the caſe would have been quite different; or if the captain had capriciouſly diſcharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themſelves, and their agreeing to do ſo might have been a ſufficient conſideration for the promiſe of an advance of wages. But the deſertion of a part of the crew is to be conſidered an emergency of the voyage as much as their death, and those who remain are

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bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of 5 l. a month.

Verdict accordingly.

The *Attorney General* and *Espinasse* for the plaintiff.

Garrow and *Reader* for the defendant.

[Attornies, *Rippingham* and *Warry*.]

But where a seaman performs some service beyond the scope of his original contract, the case is otherwise. Thus before the ransoming of ships was prohibited, a promise by the captain of a captured ship to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was held binding on the owners, although they abandoned the ship and cargo. Yates v. Hall, 1 T. R. 73.

A seaman at monthly wages, who is impressed or enters from a merchant ship into the royal navy during a voyage, is not entitled to wages to the time of his quitting the ship, unless the voyage be completed.

Anon. Coram Lord ELLENBOROUGH, at *Guildhall. Dec.* 11th, 1806.

Action for seaman's wages.—The plaintiff entered on board the defendant's ship at *Shields*, and was to have the monthly wages of 6 l. 3 s. The ship was bound to *Gibraltar* with a cargo of coals, and she arrived there in safety. She then sailed for *Zante*, where she was to take in a cargo, with which she was to return to *England*. In the course of this voyage, the plaintiff was impressed, and before it was completed the ship was captured. The defendant had paid into

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into court the amount of the plaintiff's wages to Gibraltar:—and the queſtion was, whether any thing more was due.—On the part of the plaintiff, it was contended that by virtue of ſtat. 2 G. 2. c. 36. ſ. 13. he was entitled to recover his wages from his leaving Gibraltar to the period of his being impreſſed. It is thereby enacted, "that nothing in that act contained ſhall extend, or be conſtrued to extend, to debar any ſeaman or mariner belonging to any merchant ſhip or veſſel, from entering or being entered into the ſervice of his majeſty, his heirs, &c. on board of any of his or their ſhips or veſſels; nor ſhall ſuch ſeaman or mariner for ſuch entry forfeit the wages due to him during the term of his ſervice in ſuch merchant ſhip or veſſel. And even before the paſſing of that ſtatute, it was held by HOLT, C. J. (Wiggins v. Ingleton, 2 Ld. Raym. 1211.) that an impreſſed ſeaman is entitled to his wages *pro tanto*. It followed, that the plaintiff was entitled to payment at the time when he left the ſhip, and therefore that he could not be affected by the ſubſequent caſualties of the voyage. But,

Lord ELLENBOROUGH held, that the plaintiff was not placed in a better ſituation than the other ſeamen; and was not entitled to any apportionment of wages for his ſervice during a voyage which had not been completed.

ROSE, Adminiſtrator, &c. v. BRYANT.

Monday, Dec. 18.

DEBT on bond dated in the year 1785.

Pleas, payment at, and after the day.

Several indorſements on the bond, acknowledging the receipt of intereſt down to 1793, were proved to

Indorſements on a bond acknowledging the receipt of intereſt or payment of part of the principal, are not evidence againſt the obligor to prove that the bond was on foot, without ſhewing that they were on the bond recently after their dates, and at a time when their purport was contrary to the intereſt of the obligee.

be

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be in the hand-writing of the defendant and ſigned by the inteſtate. Theſe were allowed to be good evidence of the bond remaining unſatisfied at the date of the laſt indorſement. The preſumption from lapſe of time being thus repelled, the plaintiff for the purpoſe of meeting certain direct evidence of payment in the year 1794, propoſed to read other indorſements on the bond down to the year 1795, acknowledging the receipt of intereſt and part of the principal: But theſe latter indorſements were not in the defendant's hand, nor did it appear when they were written, or even that they exiſted during the inteſtate's life-time. An objection being taken to their being read,—

Topping for the plaintiff inſiſted, that they were good evidence. The practice was, to admit all indorſements of this ſort which appeared upon the bond; and theſe were not to be looked to with ſuſpicion, as they could not have been made to repel the preſumption of payment, 20 years not having elapſed ſince the laſt indorſement in the defendant's own hand-writing. The bond remaining uncancelled in the hands of the obligee or his perſonal repreſentative, it muſt be taken to be unſatisfied, and theſe indorſements of part payment were contrary to the intereſt of the party making them.

Lord ELLENBOROUGH.—I think you muſt prove that theſe indorſements were on the bond at, or recently after, the times when they bear date, before you are entitled to read them. Although it may ſeem at firſt ſight againſt the intereſt of the obligee to admit part

part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the hand-writing of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest.

The plaintiff submitted to be nonsuited.

Topping and *Clarke* for the plaintiff.

Garrow and *Espinasse* for the defendant.

[Attornies, *Winckley* and *Warry*.]

In Searle v. Lord Barrington, 2 Stra. 826. 2 Ld. Raym. 1370. which was an action brought in 1728 on a bond dated 24th June 1697, to rebut the presumption of payment, indorsements of the receipt of interest in the obligee's own hand, dated in 1699 and 1707, were admitted to be read in evidence, and a bill of exceptions being tendered, judgment for the plaintiff was affirmed, first in the Exchequer Chamber, and then in Parliament. But in Turner v. Crisp, 2 Stra. 827. Lord RAYMOND, C. J. who had tried the former cause, held, that such an indorsement made after the presumption had taken place, could not be read in evidence, and that this was different from Searle v. Lord Barrington, where the indorsements appeared to be made before they could be thought necessary to encounter the presumption. And in Glyn v. The Bank of England, 2 Vez. 43. Lord HARDWICKE is represented to have taken the same distinction.

DECHARME

Tuesday, Dec. 19.

DECHARME and WAINE (the former ſuing as Aſſignee of James Lane, a bankrupt, and both as Aſſignees of Peter Degraves, a bankrupt) *v.* LANE.

In an action by the aſſignees of a bankrupt, the notice under 49 G. 3. c. 121. § 10. that the defendant means to diſpute the validity of the commiſſion, is not to be conſidered as part of the defendant's regular evidence in the cauſe, but may be proved at the beginning of the trial, and immediately puts the plaintiffs upon the firſt proof of the trading, petitioning creditor's debt, and act of bankruptcy.

THIS was an action on a promiſſory note payable to *James Lane* and *Peter Degraves* before they became bankrupt.

A ſeparate commiſſion had been ſued out againſt *James Lane*, who carried on trade by himſelf, and a joint commiſſion againſt *Degraves* and one *Bainbridge*, who were co-partners.

The defendant at firſt pleaded the general iſſue, without giving any notice; but afterwards, under a Judge's order, he withdrew his plea and pleaded it *de novo*, with a notice framed upon 49 G. 3. c. 121. § 10. that he meant to diſpute both the commiſſions under which the plaintiffs were appointed aſſignees.

Early in the cauſe the *Attorney General* for the defendant intimated that ſuch a notice had been given, and therefore called upon the plaintiffs to prove the trading and acts of bankruptcy of *Lane*, *Degraves* and *Bainbridge*, and a petitioning creditor's debt to ſupport each commiſſion.

Garrow for the plaintiffs inſiſted, that he ſhould make a *prima facie* caſe by putting in the proceedings under the two commiſſions, and proving the defendant's

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ant's handwriting to the promiſſory note. When it came to the defendant's turn, he might give his notice in evidence; and if it were regular, the plaintiffs would then be put upon ſtrict evidence of the facts neceſſary to ſuſtain their character of aſſignees.

Lord ELLENBOROUGH.—It is important that the practice upon this point ſhould be ſettled; and I am clearly of opinion that the notice under this ſtatute is not evidence in the cauſe. It may be proved as ſoon as the commiſſion is produced, and it will immediately put the oppoſite party upon ſupporting the commiſſion in the ſame manner as before the act paſſed.

Garrow then contended, that as the notice was not given at the time when the defendant originally pleaded the general iſſue, it had no operation, and the proceedings under the commiſſions were ſufficient evidence. The ſtatute enacted, that the notice ſhould be given by the defendant "*at or before* the time of his "pleading to the action." Here it had not been given till *after* the defendant had pleaded, and ſuch a beneficial rule ought to be ſtrictly enforced.

Although in an action by the aſſignees of a bankrupt, the defendant has once pleaded, without giving notice under 49 G. 3. c. 121. ſ. 10. which the ſtatute requires to be given, "at or before the time of his pleading," yet if he has leave to withdraw his plea and plead *de novo*, ſuch a notice given with the ſecond plea is ſufficient.

Lord ELLENBOROUGH.—The ſtatute did not mean to take away the controul of judges over the proceedings depending in their reſpective courts. When a party has been regularly permitted to withdraw his plea and plead *de novo*, the laſt muſt, when pleaded, be conſidered the plea to all purpoſes, and a notice given along with it as a ſufficient compliance with the ſtatute. It has been extremely common to allow a

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defendant to withdraw his plea and plead it again with a notice of ſet-off. The two caſes reſt upon the ſame principles.

Plaintiffs nonſuited.

Garrow, *Lawes*, and *Bolland*, for the plaintiffs.

The *Attorney-General*, *Lawes*, and *Puller*, for the defendant.

[Attornies, *Foulkes* and *Lamb*.]

Wedneſday. Dec. 20.

BOYD *v.* SIFFKIN.

If there be a contract for the ſale of goods by a particular ſhip *on arrival*, this means on the arrival of the goods which the ſhip is expected to bring, and if the ſhip arrives empty, without any default on the part of the vendor, he is not liable to the purchaſer for the non-delivery of the goods.

THIS was an action for the non-delivery of hemp. The declaration, after ſtating that the defendant expected an importation of hemp into this country in a certain ſhip called the *Fanny Almira*, alleged that he agreed to ſell to the plaintiff on arrival of the ſaid ſhip *Fanny Almira* about 32 tons (more or leſs) of Riga Rhine hemp, at 82 l. 10 s. per ton, from the landing ſcale, the amount to be paid by bill at ſix months.

The bought and ſold note produced was dated 13th Auguſt 1808, and was in the following form:

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"Sold for Mr. H. Siffkin to Mr. M. Boyd, about "32 tons, more or leſs, of Riga Rhine hemp, *on* "*arrival* per Fanny and Almira, at 82 l. 10 s. per "ton, &c. from the landing ſcale, &c."

The ſhip afterwards arrived, but without a cargo.

Garrow for the defendant contended, that the contract was improperly ſet out in the declaration, *on arrival* meaning not on the arrival of the ſhip, but of the hemp. And he cited as in point the caſe of *Hawes* v. *Humble* (*a*).

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(*a*) *Hawes v. Humble, Lancaſter Summer Aſſizes,* 1809. This was an action to recover damages for the non-performance of the following contract: "Meſſrs. Humble and Holland:

"Liverpool, Oct. 10th 1807.

"Gentlemen,

"I have this day ſold for and by your order, *on arrival,* 100 tons, more or leſs, of Teneriffe Barilla, in your Bon Fim, Tuan Feliciano, from Teneriffe, to Meſſrs. Hawes and Co. at 41 s. per cwt. 112 lbs. warranted of the firſt quality, and ſweet Barilla, and in a merchantable condition, to be received by them from the King's Beam, and if any ſea damage, an adequate allowance to be made thereon to the ſatisfaction of both parties; the barilla to be paid for as follows; viz. by their acceptance at four months date, deducting two months diſcount on the whole amount; one third to be drawn for from the firſt day of landing the barilla, and the remainder from the laſt day of landing.

Your moſt obedient ſervant,

BENJ. BATLEY."

The facts were, that the Bon Fim arrived without any barilla; which it appeared aroſe from accidental circumſtances, and without any imputation of fraud on the defendant.

WOOD, B. was of opinion, that the contract was conditional; but intimated, that if any

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The *Attorney General* argued that this was a ſale of the quantity of hemp mentioned in the note, depending only upon the contingency of the ſhip's arrival, and that the defendant had undertaken, that if the ſhip did arrive ſhe ſhould bring ſo much hemp as was thus ſold.

Lord ELLENBOROUGH.—I clearly think *on arrival* means on arrival of the hemp. The parties did not mean to enter into a wager. By *ſold* and *bought* in the note muſt be underſtood *contracted* to ſell and to buy. The hemp was expected by this ſhip. Had it arrived, it was ſold to the plaintiff. As none arrived, the contract was at an end.

Garrow further pointed out the variance between the name of the ſhip in the note and declaration, which

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any negligence could be proved againſt the captain in not procuring the barilla, he would receive that evidence.

In the reſult no proof of negligence could be given, and the plaintiffs were nonſuited, with liberty to move the Court upon the queſtion, whether it was an abſolute or a conditional contract.

In Michaelmas term laſt the queſtion came before the court of King's Bench, when the Judges unanimouſly agreed that the contract was conditional, and that if there had been any fraud on the part of the defendant, the plaintiff's remedy was an action of deceit. They therefore refuſed a rule to ſhew cauſe why there ſhould not be a new trial.

Lord

Lord ELLENBOROUGH ſeemed likewiſe to conſider as fatal.

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Plaintiff nonſuited.

The *Attorney General* and *Curwood* for the plaintiff.

Garrow and *Holroyd* for the defendant.

[Attornies, *Courteen* and *Gatty*.]

Vide Hayward v. Scougall, *ante* 56. Splidt v. Heath, *ante* 57 *n*.

Wedneſday, Dec. 20.

NORRIS *v.* AYLETT.

An action being brought againſt the acceptor of a bill of exchange, it is agreed between the parties, that the defendant ſhall pay the coſts, renew the bill, and give a warrant of attorney to ſecure the debt: The defendant gives the warrant of attorney, and renews the bill; but does not pay the coſts.—The plaintiff may bring a freſh action on the firſt bill, while the ſecond is outſtanding in the hands of an indorſee.

ACTION by the payee againſt the acceptor of a bill of exchange.—Plea, the general iſſue.

The defence reſted upon the following facts, that a former action having been commenced upon this bill between the ſame parties, it was agreed that the defendant ſhould pay the coſts then incurred, give a warrant of attorney for the debt, and renew the bill; that the defendant accordingly gave a warrant of attorney and accepted another bill for the ſame amount; that the plaintiff afterwards indorſed away the ſubſtituted bill; and that it was outſtanding in the hands of a third perſon at the commencement of the preſent action. The coſts of the former ſuit were not paid; and the

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ſubſtituted bill having been diſhonoured when due, was retired by the plaintiff before the trial, and remained unſatisfied in his poſſeſſion.

Reader for the defendant contended, firſt, that the debt due upon the bill was merged by the warrant of attorney.—But,

Lord ELLENBOROUGH ſaid, that as judgment had not been entered up, the warrant of attorney was merely a collateral ſecurity, which could not merge the original debt.

Reader then contended, that this action could not be maintained, as when it was brought the ſubſtituted bill was in the hands of an indorſee for value, to whom the defendant was liable. In *Kearſlake v. Morgan*, 5 T. R. 513. it was held that to aſſumpſit for goods ſold it was a good plea, that the defendant had indorſed a promiſſory note to the plaintiff *for and on account* of the debt. The defendant in the preſent caſe accepted the ſecond bill of exchange *for and on account* of the debt due on the firſt; and if this fact ſpecially pleaded would have been a bar to the action, it would operate in the ſame way when given in evidence under the general iſſue.

Lord ELLENBOROUGH.—The agreement between the parties was, that the defendant ſhould pay the coſts of the former ſuit, execute a warrant of attorney, and give a renewed bill of exchange. If you had pleaded ſpecially, you muſt have ſet forth this agreement,

agreement, and you must have averred that you had fully performed it. But the costs of the former suit remain unpaid. The facts of the case furnish no defence either to be put on the record or to be given in evidence. There was to be no extinguishment of the bill, until (amongst other things) the costs were paid. If they had been paid, this might have brought it within the case of *Kearslake v. Morgan*. But the agreement remaining unperformed on the part of the defendant, the plaintiff reserved to himself the power of rendering the bill available. This is like accord without satisfaction.

Verdict for the amount of the bill; the plaintiff delivering up the substituted bill to the defendant.

The *Attorney-General* and *Littledale* for the plaintiff.

Reader for the defendant.

[Attornies, *Cooper* and *Luckett*.]

Vide Drake v. Mitchell, 3 East, 251.

Wednesday, Dec. 20.

STEVENS *v.* LYNCH.

In an action by the indorsee against the drawer of a bill of exchange, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it had become due.

ACTION by indorsee against drawer of bill of exchange, payable to *J. Cleland*, and accepted by *R. Jones*.

There being no direct evidence of notice having been given of the dishonour of the bill, *Cleland* was tendered as a witness to prove that the defendant had subsequently acknowledged his liability upon it, and promised to pay it.

The *Attorney General* for the defendant, objected to *Cleland*'s competency, contending that it was clearly his interest to support the present action, as if the plaintiff succeeded, the bill would be extinguished; but if he failed, he might still sue the first indorser.

Garrow, contra, observed, that it did not appear that the plaintiff could maintain an action against *Cleland*, and that if he had been guilty of laches as to one party on the bill, the presumption was that he had as to all.

Lord ELLENBOROUGH. — The objection would exclude the party to a bill in every case where he comes to assist the plaintiff. I do not think that *Cleland* has such a direct interest in the event of this suit as to render him incompetent.

The witness was examined.

The

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The *Attorney General* opened, as a defence, that the plaintiff had given time to *Jones*, the acceptor, and that the defendant was ignorant of that fact when he acknowledged his liability, and promiſed to pay.

Lord ELLENBOROUGH allowed that this would do away the effect of the acknowledgment and promiſe: but it appeared that the defendant was fully acquainted at the time, of the indulgence granted to the acceptor, and the plaintiff had a verdict.

Garrow and *Marryat* for the plaintiff.

The *Attorney General* and *Lawes* for the defendant.

[Attornies, *Hatton* and *Barrow*.]

In an action of treſpaſs, a co-treſpaſſer not ſued, is a competent witneſs for the plaintiff; but if one of ſeveral defendants allows judgment to go by default, he is not a competent witneſs for the plaintiff, although he is for his co-defendants.

Chapman v. Graves and two others. Lancaſter Spring Aſſizes, 1810. Cor. LE BLANC, J.

The plaintiff called one *Riley*, who was a joint treſpaſſer with the defendants, but who had not been made a defendant, for the purpoſe of proving the treſpaſs.

Cockell, Serjeant, objected to his admiſſibility, and *Holroyd* cited a caſe of *Barnard v. Dawſon, Guildhall Sittings after* M.T. 1796, cor. Lord KENYON, C.J. in which ſuch teſtimony was rejected, becauſe the witneſs was intereſted in ſhifting the treſpaſs to the defendants, for as there could be only one ſatisfaction in treſpaſs, if the preſent defendants were found guilty, he he never could be ſubject to an action for the treſpaſs.

LE BLANC, J. admitted the witneſs, ſaying, that the caſe cited had never been acted upon.

In this caſe, *Froſt*, one of the defendants, had ſuffered judgment to go by default; and the

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plaintiff propoſed to call him for the purpoſe of proving the treſpaſs againſt the other defendants, upon the authority of *Ward v. Haydon and Ventom*, 2 Eſp. N. P. Cas. 552, in which Lord KENYON permitted one defendant who had ſuffered judgment by default to be called to prove that the other defendant who had pleaded was not guilty; and a caſe before WOOD, B. at the laſt Lancaſter Aſſizes, in which he had allowed one joint treſpaſſer, who had ſuffered judgment by default to be examined as a witneſs.

Cockell, Serjeant, and *Holroyd*, contended, that theſe caſes did not apply: that the latter was an action of treſpaſs for meſne profits, in which the defendant who had ſuffered judgment to go by default, was called by the other defendant to prove that he, the witneſs, was the ſole tenant of the land, and therefore that the other defendant was *not guilty*. In both thoſe caſes therefore, the witneſs was called to *exculpate* the co-defendants, but in this to *inculpate* them. Here, therefore, he has an intereſt, becauſe by proving the others guilty, he puts it in the power of the plaintiff to levy all againſt the other defendants if he thinks proper, and therefore relieves himſelf: that no inſtance can be put in which a co-defendant in treſpaſs who has pleaded not guilty, can be called as a witneſs, and no diſtinction had been pointed out between pleading not guilty, and ſuffering judgment by default, which ſhould make a defendant in the latter ſituation admiſſible, when he would not be ſo in the former: that in point of fact the defendant *Froſt* was a defendant on the record, and was intereſted in the iſſue, for the jury were not only ſworn to enquire whether the other defendants were guilty, but what damages the plaintiff had ſuffered againſt *Froſt*.

LE BLANC, J. ſaid, the general rule was, that no perſon who was a party to the record was admiſſible as a witneſs; that in the two caſes cited, the co-defendant was called to exculpate the other defendants; here, it was propoſed to call a co-defendant to inculpate the others. The caſes therefore were diſtinguiſhable; and he was diſpoſed where there was an innovation not to extend it, and therefore he held the witneſs inadmiſſible.

The plaintiff, however, had a verdict on other evidence.

Vide Bull. N. P. 98. 285.

WILKINSON

WILKINSON *v.* KING and others.

Thurſday, Dec. 21.

TROVER for a quantity of lead.

The owner of goods ſends them to a wharf in the Borough of *Southwark*, where goods of the ſame ſort are uſually ſold: The wharfinger, without any authority, ſells them to a *bonâ fide* purchaſer, who duly pays for them.—This is not a ſale in *market overt* to change the property, and trover lies for the goods at the ſuit of the owner againſt the purchaſer.

The plaintiff had ſent the lead in queſtion to the wharf of one *Ellil* in the Borough of Southwark, there to remain till it ſhould be ſold. *Ellil* was accuſtomed to ſell lead from this wharf; but had no authority whatever to ſell the lead in queſtion, and never had ſold any for the plaintiff before. However, he ſold this lead to the defendants, who bought it *bonâ fide* as his property, and paid him for it by a bill of exchange.

Garrow contended, that this ſale had taken place in *market overt*, and had transferred the property in the lead to the defendants. The ſpot where the transfer was made was in the Borough of *Southwark*, which muſt be conſidered a part of the metropolis; and it was laid down in the books on this ſubject, that in *London*, every ſhop in which goods are publicly expoſed to ſale, is *market overt* for ſuch things as the owner profeſſes to trade in, and that though in the country *market overt* is only on the ſpecial days when the market is held by charter or preſcription, yet in *London* every day, except Sunday, is market day. Therefore, this lead having been ſold to the defendants by *Ellil* at his wharf, where he dealt in lead, became their property, and the plaintiff muſt ſeek his remedy

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againſt *Ellil*, whom he had enabled to commit the fraud, out of which the action aroſe.—But,

Lord ELLENBOROUGH held that the ſale by *Ellil* did not change the property in the lead, and obſerved that the doctrine contended for would give wharfingers the dominion over all the goods intruſted to them; but that a wharf could not be conſidered, even in *London*, as a market overt for the articles brought there. *Ellil* had no colour of authority to ſell the lead, and no one could derive a good title to it under ſuch a tortious converſion.

Verdict for the plaintiff.

The *Attorney General*, *Park*, and *Richardſon* for the plaintiff.

Garrow, *Gaſelee*, and *Barnewall* for the defendants.

[Attornies, *Dodd* and *Wadeſon*.]

At the ſittings after Hilary Term, 1810, other actions by the ſame plaintiff againſt other defendants, to whom *Ellil* had ſold quantities of lead under the ſame circumſtances, came on to be tried before Lord ELLENBOROUGH, when after full argument, his Lordſhip adhered to his former opinion.—*Vide* 2 Blac. Com. 449.

If goods ſtolen are pawned, the owner may maintain trover againſt the pawnbroker.

Packer v. Gillies, *Guildhall Sittings after Trinity Term*, 1806. Trover againſt a pawnbroker for goods pledged with him, which had been ſtolen. It appeared that the goods in queſtion were ſtolen from the houſe of the plaintiff, and had been pawned by

by a woman of the name of *Brown*, but that she had been tried for the felony, and acquitted, on the absence of a material witness. Lord ELLENBOROUGH held, that the action well lay, and the plaintiff had a verdict.

N. It is provided by stat. 1. Jac. 1. c. 21. that the sale of any goods wrongfully taken, to any *pawnbroker* in London, or within two miles thereof, shall not alter the property.

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HEYMAN *v.* NEALE.

Thursday, Dec. 21.

THIS was an action for not accepting a quantity of hemp.

Where a broker is authorized by one man to sell goods, and to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is a binding contract between the parties. *The bought and sold note*, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract.

The question was, whether there had been a complete contract between the parties upon this subject.

Mr. *Forrester*, the broker, swore that he had authority from the plaintiff to sell, and from the defendant to buy, the hemp in question for the one and the other respectively; that he in consequence made an entry in his book, of having sold it for the plaintiff to the defendant; that he then sent a copy of this entry to each of the parties; and that when he next saw the defendant, the latter objected to the terms of the *bought note*, and said he would not be bound by it. The witness added, that he conceived he was authorized

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rized to buy the hemp for the defendant on the terms mentioned in the ſale book.

Park contended, that the bought and ſold notes were only ſent on approbation, and the contract was not complete till they were agreed to by the parties; that though conſent might be inferred from no objection being taken, either party might diſaffirm the contract by giving immediate notice of his diſſent; that the broker was veſted with powers merely to propoſe the conditions of the bargain, but not finally to conclude it; and that as the defendant had taken the earlieſt opportunity of informing Mr. *Forreſter*, that he was diſſatisfied with the bought note, the preſent action could not be ſuſtained.

Lord ELLENBOROUGH.—After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. The *bought and ſold note* is not ſent on approbation, nor does it conſtitute the contract. The entry made and ſigned by the broker, who is the agent of both parties, is alone the binding contract. What is called the *bought and ſold note* is only a copy of the other, which would be valid and binding, although no *bought or ſold note* was ever ſent to the vendor or purchaſer. The defendant is equally liable in this caſe as if he had ſigned the entry in the broker's book with his own hand.

It afterwards appeared that the hemp was not of the quality ſpecified in the contract, and the plaintiff ſubmitted to be nonſuited.

The

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HEYMAN v. NEALE.

The *Attorney General*, *Garrow*, and *Taddy*, for the plaintiff.

Park, *Jervis*, and *Espinasse*, for the defendant.

[Attornies, *Kaye* and *Reeks*.]

The authority of the broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the Statute of Frauds, although he has previously entered into a verbal agreement to sell the goods.

Farmer v. Robinson, Cor. Lord ELLENBOROUGH, *Guildhall*, *July* 22, 1805.—Action for not delivering a quantity of brimstone. The defendant had authorized a broker to sell some brimstone for him at a certain price, and the broker had accordingly agreed to sell it to the plaintiff at that price; but before the sale note was made out, defendant countermanded the authority of the broker, and said, that plaintiff should not have the goods.—Lord ELLENBOROUGH held, that under these circumstances the contract could not be enforced.

STOKES *v.* CARNE and others.

Saturday, Dec. 23.

In an action against several defendants for stores supplied to a ship by order of the captain, the register obtained on the oath of one of the defendants is *prima facie* evidence of ownership against all.—The owners of a post-office packet are liable for stores ordered by the captain who is appointed by the postmaster-general.

ACTION for stores supplied to a packet employed by the Post Office to carry the mail between Milford Haven and Waterford. The stores had been ordered by the captain who is appointed by the post-master general.

To

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STOKES v. CARNE and others.

To prove that the defendants were owners of the packet, the regiſter was put in, which appeared to have been obtained on the oath of *John James*, one of the Defendants (*a*).

Garrow contended that this was not ſufficient evidence to charge all the defendants, and that it was neceſſary to prove their title more ſtrictly, or to ſhew that they had acted as owners.

Lord ELLENBOROUGH.—I think the regiſter is *prima facie* evidence of ownerſhip. I will admit contrary evidence, on the part of any of the defendants, to prove that they never aſſented to their names being put into the regiſter, and never had any connexion with the veſſel in queſtion. Had notice been given that they meant to deny the ownerſhip, perhaps the plaintiff might have been put upon ſtricter proof of that fact; but where perſons are ſued as owners, who give no ſuch notice, the regiſter is ſufficient to throw the burthen upon them of proving the contrary.

Garrow then inſiſted that the defendants could not be liable for ſtores ordered by a captain appointed, not by them, but by the poſt-maſter general, and who was the ſervant and agent of government.—But,

Lord ELLENBOROUGH held, that as the ſtores were ſupplied to the packet of which the defendants were

(*a*) 26 G. 3. c. 60. § 10, 11.

owners,

owners, and the earnings of which they received, they were liable as in the common caſe of ſtores or repairs ordered by the maſter of a merchant veſſel.

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STOKES v. CARNE and others.

The plaintiff had a verdict.

The *Attorney General* and *Gaſelee* for the plaintiff.

Garrow and *Marryat* for the defendants.

[Attornies, *Wiſtons* and *Welch*.]

Vide Fraſer v. Hopkins, *ante* 170.

BLACKBURN *v.* SCHOLES and another.

Friday, Jan. 19.

In *indebitatus aſſumpſit* for goods ſold, payment of money into court after *a particular* ſtating that the action is brought for the price of a certain lot of goods ſold to the defendant on ſuch a day by A. B. the plaintiff's broker, does not admit that the goods purchaſed by the defendant of A. B. on the day ſpecified, were the property of the plaintiff.

THIS was an action for goods ſold and delivered to recover the ſum of 2132l. being the price of 94 bags of cotton wool.

The defendant pleaded the general iſſue, and paid 5l. into court.

Before the payment of money into court, *a particular* had been delivered under a judge's order, ſtating that the action was brought for the price of 94 bags of cotton wool ſold for the plaintiff to the defendants by *Meſſrs. Kenyon and Son* on the 17th of June 1807.

It was proved that on that day *Meſſrs. Kenyon and Son* ſold ſuch a quantity of goods to the defendants in

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officio. The terms of the contract cannot then be altered except by the authority of the principal. The queſtion here therefore will be, whether Kenyon and Son ſold theſe goods as principals or as brokers?

Verdict for the defendant.

Park, *Lawes*, and *Puller*, for the plaintiff.

The *Attorney General*, *Garrow*, and *Holroyd*, for the defendant.

[Attornies, *Wild* and *Sudlow*.]

Vide Bennet v. Favenc, 11 Eaſt, 36.

Saturday. Jan. 20.

STONARD *v.* DUNKIN and another.

A warehouſeman who, on receiving an order from the ſeller of malt to hold it on account of the purchaſer, gives a written acknowledgment that he ſo holds it, cannot ſet up as a defence for not delivering it to the purchaſer, that by the uſage of trade the property in malt ſold is not transferred till it is *remeaſured*, and that before the malt in queſtion was remeaſured, the ſeller became bankrupt.

TROVER for malt,—the queſtion being, whether the plaintiff or the aſſignees of one *Knight* were entitled to it.

The plaintiff gave in evidence an order from *Knight* to the defendants, who are warehouſemen, to hold the malt on the plaintiff's account, a written acknowledgement from the defendants that they held

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STONARD v. DUNKIN and another.

it on the plaintiff's account; and that he had advanced 7,500l. to *Knight*, for which the malt was to be a ſecurity.

Garrow for the defendants contended that the malt, notwithſtanding, paſſed under the commiſſion to *Knight*'s aſſignees, as from the univerſal uſage and conſent of the trade (which he undertook to prove) *remeaſuring* was neceſſary to a transfer of property in articles of this nature, and the bankruptcy intervened before the malt in queſtion was re-meaſured.

Lord ELLENBOROUGH.—Whatever the rule may be between buyer and ſeller, it is clear the defendants cannot ſay to the plaintiff, "the malt is not yours," after acknowledging to hold it on his account. By ſo doing, they attorned to him; and I ſhould entirely overſet the ſecurity of mercantile dealings, were I now to ſuffer them to conteſt his title.

Verdict for the plaintiff.

The *Attorney-General* and *Lawes* for the plaintiff.

Garrow and *Gaſelee* for the defendants.

[Attornies, *Towſe* and *Druce*.]

Vide Harman v. Anderſon, *ante* 243.

Saturday. Jan. 20.

TYE *v.* GWYNNE.

In an action on a bill of exchange accepted for the price of goods purchased for exportation, the defendant cannot give in evidence that the goods were of a bad quality, and improperly packed, but is driven to his cross-action.

THIS was an action by the drawer and payee of a bill of exchange for 1,984*l.* against the acceptor. Plea, the general issue.

The defendant proposed to prove, in mitigation of damages, that the bill had been accepted for the price of a quantity of cheese sold by the plaintiff to the defendant for exportation; that the cheese was of a bad quality, and improperly packed, and that the consideration for the acceptance had in a great measure failed.

The *Attorney-General* for the plaintiff insisted that this evidence was inadmissible, and relied upon *Morgan* v. *Richardson*, 1 *Campb.* 40. *n.* which in its circumstances could not be distinguished from the present case, and which he himself had brought before the court of King's Bench, when the direction of the Chief Justice at Nisi Prius was fully confirmed.

Garrow, *contra*, said that in that case there was money paid into court, a circumstance on which one of the Judges had placed considerable reliance. Here there was nothing to prevent the defendant from proving a partial failure of consideration. On the principle laid down in *Farnsworth* v. *Garrard*, 1 *Campb.*

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1 *Campb.* 38. the defendant ought to be allowed to ſhew that he had derived leſs benefit under the contract than he had ſtipulated for, without being driven to his croſs action. This very point had been decided by Lord KENYON in *Barber v. Backhouſe*, *Peak. Caſ.* 61, where it was held, that if there be no conſideration for part of the ſum contained in a bill of exchange, the jury may apportion the damages, and need not find to the whole amount.

Lord ELLENBOROUGH.—Sitting here, I ſhall certainly adhere to the judgment of the Court in *Morgan* v. *Richardſon*. Although money was there paid into Court, that circumſtance formed no ingredient in the opinion I then expreſſed. A bill of exchange cannot be accepted on a quantum meruit. There is a difference between want of conſideration, and failure of conſideration. The former may be given in evidence to reduce the damages; the latter cannot, but furniſhes a diſtinct and independent cauſe of action. In *Farnſworth* v. *Garrard* no bill of exchange had been given, and I held that upon the *quantum meruit*, the defendant might ſhew the exact degree of benefit he had received, or that he had received none. The laſt caſe cited, I think does not apply, as there never was any ſufficient conſideration to the full amount of the bill, which was fraudulently drawn on the partnerſhip. And I am ſtill inclined to acquieſce in the dictum of Mr. Juſtice DENNISON there quoted, that "there is a diſtinction between the *contract* and the "*ſecurity*. If part of the *contract* ariſes on a good "conſideration, and part on a bad one, *it* is *diviſible*.

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"But it is otherwiſe as to the *ſecurity*, that being "*entire*." (*a*)

However, the next cauſe ſtanding in the paper being a croſs action between the ſame parties, it was agreed to refer both to arbitration.

The *Attorney General* and *F. Pollock* for the plaintiff.

Garrow, *Lawes*, and *Puller* for the defendant.

[Attornies, *Wild* jun. and *Wild*.]

(*a*) 2 Burr. 1082.—*Vide* Ledger v. Emer, Peak. Caſ. 216. Wiffen v. Roberts, 1 Eſp. Caſ. 261. Fleming v. Simpſon, 1 Campb. 40. *n*.

Saturday. Jan 20.

HARRIS and another *v.* BOSTON.

Where a factor advances money to purchaſe goods, if he receives, beſides legal intereſt, a higher commiſſion on theſe purchaſes than he would have been contented to take had he not advanced the money, the tranſaction is uſurious.

THIS was an action to recover a ſum of about 3,900l. upon two bills of exchange and the balance of an account.

The plaintiffs were ſeed factors, and bought large quantities of rape ſeed for the defendant; they advanced the money for theſe purchaſes, for which they charged the legal intereſt of 5l. per cent.; and in addition to that, it was agreed that they ſhould have a commiſſion of $2\frac{1}{2}$ per cent. upon all the ſeed purchaſed. In this manner the debt was contracted.

The

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HARRIS and another v. BOSTON.

The defence was, that these transactions were usurious; and many witnesses acquainted with the trade were called, who swore that the highest commission they had ever known taken upon such purchases was *one shilling a quarter*, which at the current price of rape seed amounted exactly to one per cent.

Lord ELLENBOROUGH.—It will first be a question of fact, whether the commission of $2\frac{1}{2}$ per cent. exceeds what can be fairly and reasonably referred to the plaintiff's trouble and risk in making these purchases. If it does, then by an inference of law, it must be ascribed to the advance and forbearance of the money, and the contract is usurious. If the plaintiffs would have duly made the purchases for one per cent. but charge $2\frac{1}{2}$ besides legal interest where they advance the money, this commission must be considered an expedient for enhancing the rate of interest beyond 5 per cent. and is a mere colour for usury.

The Jury however found a verdict for the plaintiff.

Park and *Parnther* for the plaintiffs.

The *Attorney General* and *Marryat* for the defendant.

[Attornies *Druce* and *Lee*.]

Vide Morse v. Wilson, 4 T. R. 353.

Monday. Jan. 22.

PHELPS *v.* AULDJO.

The maſter of a merchantman while taking in his loading at a foreign port, is ordered by the captain of a King's ſhip to go out to ſea to examine a ſtrange ſail diſcovered in the offing, bearing enemies colours: Without remonſtrating, and without any force or threats being employed to influence his determination, he obeys; and finding the ſtrange ſail to be a neutral, he returns to port. *Held*, that this was an unexcuſed deviation, which vacated a policy on goods on board the merchantman.

ACTION on a policy of inſurance on goods on board the *Margaret and Anne* from *Iceland* to this country. The riſk was made to commence in the common form, from the loading of the goods. A total loſs was proved as laid, to have happened by fire; and the only queſtion was, whether the maſter had not been guilty of a deviation.

It appeared that while he lay at *Iceland*, and when he had taken in almoſt the whole of the cargo, the captain of an Engliſh ſhip of war lying near him, the topmaſt and yards of which were then ſtruck, ordered him to go out to ſea to examine a ſtrange ſail, which was diſcovered in the offing bearing enemies' colours; that the maſter did not remonſtrate againſt this order, but unmoored and put out to ſea; that although 40 of the crew of the ſhip of war had been on board the *Margaret and Anne* in the morning of the ſame day, they had all been withdrawn before he began to unmoor, and that no violence or threats were uſed to induce them to do ſo; that he fired two guns at the ſtrange ſail and brought her to, when ſhe appeared to be a neutral; and that he then returned to his moorings. Being examined as a witneſs, he ſaid he conſidered himſelf bound to obey the orders of the captain of the ſhip of war, but he did not make any proteſt upon the occaſion.

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The *Attorney General*, for the plaintiff, contended that the deviation was excuſed by the controul exerciſed over the maſter. He did not expoſtulate, becauſe his expoſtulations would have been unavailing. The captain of the ſhip of war had ample means of enforcing his orders. If this was held to vitiate the policy, the conſequence would be, that maſters of merchantmen would conſtantly reſiſt the commands of the King's officers.

Lord ELLENBOROUGH.—I am of opinion that this is an unexcuſed deviation. Where is the *vis major?* The maſter is not proved to have acted under any dureſs or compulſion. If a degree of force was exerciſed towards him which either phyſically he could not reſiſt, or morally as a good ſubject he ought not to have reſiſted, the deviation is juſtified. But if he choſe to go out in the hope of making a prize, he could not thereby extend the riſk of the underwriters. Suppoſe the ſhip had been captured when ſhe went out upon this cruiſe, were the underwriters to bear the loſs? The purpoſe might be laudable, and a compenſation to the owners would probably have been made by government; but when the ſhip engaged in this hoſtile adventure, the voyage inſured was at an end.

Plaintiff nonſuited.

The *Attorney General*, *Garrow*, and *Marryat*, for the plaintiff.

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Park, *Topping*, and *J. Warren*, for the defendant.

[Attornies, *Swain* and *Crowder*.]

It ſeems now ſettled that if an Engliſh ſhip be ſeized or detained by our own government, for purpoſes of ſtate, the underwriters are liable, (Page v. Thompſon, Park, 109, *n.* 6th Ed.); although a Britiſh underwriter be not liable to anſwer for any damages which the owner of a foreign veſſel may ſuſtain from an embargo laid on foreign ſhips in the ports of Great Britain, in the nature of repriſals and partial hoſtility. Touteng v. Hubbard, 3 Boſ. Pul. 291. But if a Britiſh ſhip be ſtopped in her courſe by the captain of a king's ſhip, from an apprehenſion of hoſtilities, and after being detained till intelligence arrives of a hoſtile embargo at the port of deſtination, ſhe returns to her port of outfit; this loſs of the voyage is not attributable to the *arreſt or detainment of kings, princes, or people*, and is not within the policy. Forſter v. Chriſtie, 11 Eaſt, 205.

Monday, Jan. 22.

RANDALL, *v.* LYNCH.

If by reaſon of the crowded ſtate of the *London Docks*, a ſhip is detained there before ſhe can be unloaded, a longer time than is allowed for that purpoſe by the terms of the charter party, the freighter is liable for this detention to the owner of the ſhip.

THIS was an action on a charter party of affreightment, dated 1ſt April 1809, for a voyage to *Lanceretto* and back to London; whereby it was covenanted that, "being fully laden and diſpatched, the "maſter ſhould and would with the then firſt favour- "able opportunity, ſet ſail and depart from the port "or place at which he might have completed his "homeward cargo, and proceed direct to the ſaid "port of London, and upon arrival there (that is to "ſay)

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" ſay) at the *London Docks*, after regular report being " firſt made at the Cuſtom-houſe, make diſcharge and " faithful delivery of the ſaid homeward cargo and " and every part thereof unto the ſaid affreighter or " his order, or according to bill or bills of lading, or " otherwiſe, and there end and complete both out and " homeward voyages:" and it was further covenanted, " that forty days ſhould be allowed for un- " loading, loading, and again unloading the ſaid " cargoes, to commence and be computed at *Lance-* " *retto*, from, and including, the day after the ſaid " maſter ſhould be ready to make diſcharge of ſuch " part of his cargo as was intended to be landed there, " and notice given thereof to the ſaid affreighter's " agent at that place, and to continue in *London* from " the day of reporting at the Cuſtom-houſe: and like- " wiſe it was agreed between the parties, that it ſhould " be lawful for and at the option of the ſaid affreighter " or his agents to keep and detain the ſaid veſſel for " the ſpace of ten working days over and above the " herein-before ſtipulated forty days, upon paying " him the ſaid maſter or his repreſentative 5l. ſterling " per day for each and every of the ſaid ten over " lying days or days of demurrage."

In the declaration, the following breach was aſſigned " that the defendant did not nor would unload, load, and unload again the ſaid reſpective cargoes of the ſaid veſſel within the ſaid forty days in the ſaid charter party mentioned, and ſtipulated and allowed for thoſe purpoſes, computed as therein mentioned, and the ſaid ſpace of ten working days over and above the ſaid

 ſtipulated

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ſtipulated 40 days, but kept and detained and cauſed to be kept and detained the ſaid ſhip or veſſel with a part of the ſaid homeward cargo on board her in the *London Docks* aforeſaid, for another long ſpace of time, to wit, the ſpace of 35 days after the expiration of ſuch ſeveral periods of forty days and ten days; whereby the plaintiff, during all the time laſt aforeſaid, loſt and was deprived of the uſe and profit of his ſaid ſhip or veſſel, contrary, &c."

The defendant pleaded *non eſt factum;* and to the laſt breach "that he did not keep and detain and cauſe to be kept and detained the ſaid ſhip or veſſel with a part of the ſaid homeward cargo on board her in the London Docks aforeſaid, after the expiration of ſuch ſeveral periods of forty days and ten days *modo & forma*, &c."

The ſhip arrived from *Lanceretto* in the *London Docks* on the 10th of Auguſt, and was reported next day at the Cuſtom-houſe. The 40 days ſtipulated in the charterparty for unloading the outward cargo, and loading and unloading the homeward cargo, expired on the 22d of Auguſt; but on account of the crowded ſtate of the Docks, her diſcharge could not then be begun, and it was not finally completed till the 6th of October, being about 31 days after the expiration of the ten days during which time ſhe might be kept on demurrage of 5l. a day. The queſtion was, whether the defendant as freighter was, under theſe circumſtances, liable for the detention of the ſhip?

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The *Attorney General* for the defendant contended that an action might as well be brought againſt the captain or owners for not making a due delivery of the cargo. The one was as anxious to receive as the others to get rid of it. The delay was not in any degree to be imputed to the defendant, but to circumſtances over which he had no controul. It could not be ſaid, that he had his remedy over againſt the Dock Company, who were as little in fault as the owner of the ſhip or the freighter. To what was the delay to be imputed? Solely to the act of parliament, which requires ſhips with ſuch cargoes to unload in the *London Docks*. The Dock Company had done every thing in their power to expedite the diſcharge of all the ſhips that entered the Docks; but the number at this time was ſo extraordinary that many of them were neceſſarily obliged to wait weeks before they could get a birth. The Docks could not be enlarged at pleaſure to ſuit the exigency of the moment. Upon this iſſue, the plaintiff was bound to prove that the defendant had detained the ſhip in the manner ſtated in the breach. He had not done ſo. It was impoſſible for him to do ſo. The ſhip had been detained not by the defendant, but by the ſtatute in ſuch caſe made and provided.

Lord ELLENBOROUGH.—The queſtion is, whether the detention of the ſhip ariſing from the inability of the London Dock Company to diſcharge her is, in point of law, imputable to the freighter; and I am of opinion that the perſon who hires a veſſel detains her, if at the end of the ſtipulated time he does not reſtore

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her to the owner. He is reſponſible for all the various viciſſitudes which may prevent him from doing ſo. While the goods remained on board the veſſel in the *London Docks*, it was impoſſible for the plaintiff to make any uſe of her, and to all intents and purpoſes ſhe was there detained by the defendant. When ſhe was brought into the Docks, all had been done which depended upon the plaintiff, and the Dock Company were the defendant's agents for her delivery. The defendant is as much reſponſible for a delay ariſing from the want of a birth, as if it had ariſen from tempeſtuous weather or any other cauſe. This iſſue muſt therefore be found for the plaintiff, and the jury will conſider to what compenſation he is entitled for the detention after the 10 days during which the ſhip was allowed to be detained at 5l. a day.

The jury awarded 31 days more at the ſame rate (*a*).

If by a charterparty leave is given to detain the ſhip a certain number of days for the purpoſe of diſcharging her cargo, this amounts to a covenant on the part of the freighter, that he will not detain her longer.

In the enſuing term the *Attorney General* (without objecting to the CHIEF JUSTICE's direction upon this point, or the manner in which the iſſue joined on the record had been found) moved *in arreſt of judgment*, on the ground that the breach for detaining the ſhip beyond the 40 lay days, and the 10 demurrage days, was not warranted by the charterparty, there being no covenant on the part of the freighter to deliver up the ſhip at the end of that time.—A rule to ſhew cauſe

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(*a*) *Vide* Atkinſon v. Ritchie, 10 Eaſt, 530.

was

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was granted, but it was afterwards discharged, the COURT clearly thinking, that from the leave given to the defendant to keep the ship so long, there was an implied covenant that he would keep her no longer, upon which the breach was well assigned (*a*).

The defendant had paid money into court on the breach for non-payment of freight.

In an action of covenant, if money be paid into court on any one of the breaches, it is unnecessary to prove the deed.

A question arose at the trial, whether this dispensed with the necessity of proving the execution of the charterparty.

The *Attorney General* insisted that the plaintiff was still bound to produce the attesting witness, that he might be cross-examined as to the circumstances under which the deed was executed.—But,

Lord ELLENBOROUGH held, that the rule to pay money into court was a sufficient admission of the execution of the deed to dispense with the production of the attesting witness.

Park, *Topping*, and *Marryat*, for the plaintiff.

The *Attorney General*, *Garrow*, and *Barrow*, for the defendant.

[Attornies, *Hatton* and *Barrow*.]

(*a*) *Vide* Com. Dig. Covenant. (A. 2.)

COURT

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

CLIFFORD, ESQ. *v.* BRANDON.

Although the audience in a public theatre have a right to expreſs the feelings excited at the moment by the performance, and in this manner to applaud or to hiſs any piece which is repreſented, or any performer who exhibits himſelf on the ſtage; yet if a number of perſons having come to the theatre with a predetermined purpoſe of interrupting the performance, for this purpoſe make a great noiſe and diſturbance, ſo as to render the actors entirely inaudible, tho' without offering perſonal violence to any individual or doing any injury to the houſe, they are, in point of law, guilty of *a riot*.

THIS was an action of aſſault and falſe impriſonment.—The firſt count of the declaration ſtated, that the defendant, with force and arms, &c. made an aſſault upon the plaintiff in a certain public theatre, called *The New Theatre Royal, Covent Garden*, ſituate in the pariſh of St. Paul Covent Garden in the county of Middleſex, and ſeized and laid hold of the plaintiff and ſtruck him, a great many violent blows, and forced and compelled him to go from and out of the ſaid theatre into and along a certain ſtreet there to a certain police office ſituate and being in the pariſh aforeſaid, in the county aforeſaid, and impriſoned him, and kept and detained him in priſon there, without any reaſonable or probable cauſe whatſoever, for a long ſpace of time, contrary to the laws of this realm, &c. The ſecond count was for falſe impriſonment generally; and the laſt for a common aſſault.

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Pleas, 1. Not guilty. 2dly, that before and at the ſaid time when, &c. the ſaid theatre in the ſaid declaration mentioned was and is a certain public theatre, the proprietors whereof then and there had lawful licence, power, and authority from time to time to exhibit and preſent tragedies, comedies, operas, plays, and farces within the ſaid theatre, and to take and receive certain reaſonable ſums of money as and for the prices of admiſſion into the ſaid theatre from and of perſons wiſhing to ſee and hear the performance and exhibition of ſuch tragedies, comedies, operas, farces, and plays within the ſaid theatre (*a*); and that a little

(*a*) The Covent Garden Company act under a patent, bearing date the 15th of January, 14th of Charles II. granted to Sir WM. DAVENANT, whereby he, his heirs, executors, adminiſtrators, and aſſigns are authorized to erect a new theatre in any place within the Cities of London and Weſtminſter, or the ſuburbs thereof; and to gather together, entertain, govern, privilege, and keep a company of players to exerciſe and act tragedies, comedies, plays, operas, and other performances of the ſtage therein; who were to be the ſervants of his Majeſty's dearly beloved brother JAMES DUKE OF YORK; and "to take and receive of ſuch as ſhall reſort to ſee or hear any ſuch plays, ſcenes, and entertainments whatſoever, ſuch ſum or ſums of money as either have accuſtomably been given and taken in the like kind, or ſhall be thought reaſonable by him or them in regard of the great expence of ſcenes, muſic, and ſuch new decorations as have not been formerly uſed."—The patent then prohibits the exhibiting of plays by all others beſides this company and a company to be eſtabliſhed by T. KILLIGREW Eſq. and called *the King and Queen's Company*;—directs that no actor ejected by one of theſe companies ſhall be received into the other, without the conſent of the company whereof he was a member

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a little before the ſaid time when, &c. to wit, on the day in the declaration mentioned, the plaintiff, together with divers other perſons to the number of three and more, unlawfully, riotouſly and routouſly made and raiſed, or cauſed to be made and raiſed, a great noiſe, riot, diſturbance and tumult in the ſaid theatre for the purpoſe of forcing and compelling, and in order unlawfully and by force and violence to compel the ſaid proprietors of the ſaid theatre to lower and reduce the prices of admiſſion into certain parts of the ſaid theatre, and for that purpoſe at the time when, &c. and during the performance of a certain farce or play in the ſaid theatre, the plaintiff and the ſaid other perſons, to the number of three and more, were making a great noiſe, riot, diſturbance, and tumult in the ſaid theatre, to the great annoyance and diſturbance of divers peaceable and orderly ſubjects of our Lord the King then being in the ſaid theatre for the purpoſe of hearing and ſeeing the performance of the ſaid farce or play, to the great damage and injury of the ſaid proprietors of the ſaid theatre, and in breach of the peace of our ſaid Lord the King; wherefore the defendant at the time when, &c. as the ſervant of the ſaid proprietors of the ſaid theatre, and by their com-

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a member, ſignified under hand and ſeal;—grants permiſſion for women's parts to be repreſented by men;—requires the old plays to be purged of all ſcandalous and offenſive paſſages;—and concludes with a *non obſtante* clauſe, giving full effect to the patent, "*any law, ſtatute, act, ordinance, proclamation, proviſion, or reſtriction, or any other matter, cauſe, or thing whatſoever, to the contrary in anywiſe notwithſtanding.*"

mand,

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mand, gave charge of the plaintiff in the ſaid theatre to one *S. T.* who then and there was a conſtable and peace or police officer, duly and lawfully authorized to take ſuch charge, to be by him taken and carried before ſome magiſtrate and juſtice of the peace in and for the ſaid county of Middleſex, to be examined touching and concerning the ſaid riot and breach of the peace, and to be dealt with according to law; and on that occaſion, and for that purpoſe, the ſaid *S. T.* took charge of, and took the plaintiff into cuſtody, and brought him from and out of the ſaid theatre into and along the ſaid public ſtreet there to the ſaid police office, the ſame being the neareſt and moſt convenient way, before *James Read*, Eſq. then and there being one of the juſtices, &c. to be examined touching and concerning the ſaid offence, riot and breach of the peace, and to be further dealt with according to law, and on that occaſion the plaintiff was neceſſarily and unavoidably kept and detained in cuſtody and impriſoned for the ſpace of time in the declaration mentioned, and until he was afterwards duly diſcharged therefrom, as was lawful, &c.—3dly, After ſtating the riot as before, that at the ſaid time when, &c. the plaintiff was in the ſaid theatre unlawfully, wickedly, and maliciouſly inciting and encouraging, and endeavouring and labouring to perſuade, inſtigate and prevail on, and did then and there unlawfully, wickedly, and maliciouſly incite, encourage, endeavour and labour to perſuade, inſtigate and prevail on the ſaid perſons to the number of three and more, and divers other diſorderly and riotous perſons then in the ſaid theatre to perſevere and continue in ſuch

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riotous, routous, and unlawful tumult, riot, and disturbance, and the said persons and others did then and there, in pursuance of such wicked instigations and endeavours, continue to make, and at the said time when, &c. were making a great noise, riot, disturbance, and tumult in the said theatre for the unlawful purposes aforesaid; whereupon the defendant as the servant, &c.—4thly, That the plaintiff and others to the number of three and more, were making a noise and riot for the purpose of preventing the performance of a certain farce which the proprietors had lawful power, licence, and authority to cause to be performed and represented in the said theatre: 5thly, That he was instigating others to make a riot for the same purpose.—There were three other pleas more general than the foregoing.

Replication, *de injuria sua propria, absque tali causa.*

It appeared in evidence that the plaintiff Mr. *Clifford*, a gentleman of great eminence at the bar, on the 31st of October last, between nine and ten in the evening, went into the pit of Covent Garden theatre, which had been lately rebuilt. On this, as on every night from the first opening of the house, great noise and confusion prevailed, on account of the prices of admission to the pit and boxes being raised, and the public being excluded from a number of boxes which were let to particular individuals for the season. The performance on the stage was inaudible; the spectators sometimes stood on the benches, and at other times sat down with their backs to the performers; while the

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the play was repreſenting, "God ſave the king!" and "Rule Britannia!" were ſung by perſons in diffent parts of the theatre; horns were blown, bells were rung, and rattles were ſprung; placards were exhibited, exhorting the audience to reſiſt the oppreſſion of the managers; and a number of men wore in their hats the letters O. P. or N. P. B. meaning *Old Prices* and *No Private Boxes*. But although there were ſome ſham-fights in the pit, no violence was offered to any perſon either on the ſtage or in any other part of the houſe, and no injury was done to the theatre itſelf, or any of its decorations. When Mr. *Clifford* entered, there was a cry of "There comes the honeſt counſellor!" and a paſſage being opened for him, he went and ſeated himſelf in the centre of the pit. Soon afterwards, a gentleman aſked him, if there was any harm in wearing the letters O. P. He anſwered "No." The gentleman then aſked him, if he had any objection to wear them himſelf. He ſaid *he had not*. The letters O. P. were then placed in his hat, and he put it on thus ornamented. He continued, however, to ſit without taking any part in the diſturbance, and he perſuaded a perſon who was near him to deſiſt from blowing a trumpet. Having conducted himſelf in this quiet manner while he remained in the theatre, he was retiring from it. Whether the performance was entirely over at the time, did not certainly appear. When he had got about two yards from the pit door, where the money is received, the defendant, who is Box-keeper to the theatre, ordered him to be taken into cuſtody. A conſtable accordingly laid hold of him, and carried him to the police office in Bow-ſtreet, before Mr. *Read* the magiſtrate preſiding there;

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but nothing being proved againſt him, except that he wore O. P. in his hat, after being detained about half an hour, he was ſet at liberty. The queſtion was, whether theſe facts proved the juſtification?

Beſt, Serjeant, for the plaintiff, contended that there had been no riot in the theatre; that the plaintiff had not inſtigated it, if there was; and that, at all events, he had been illegally arreſted and impriſoned after the riot had ceaſed. A riot muſt be to the terror of his Majeſty's ſubjects. In this inſtance, no terror or apprehenſion was felt by any one. The audience were more amuſed with what was going forward than they would have been by the performance of the ſtage. Within the walls of a public theatre, the public have a right to expreſs their approbation or diſapprobation without limit or controul. This is a right which has been immemorially exerciſed, which is eſſential to the proſperity of the drama, and which never was before queſtioned in a court of juſtice. It ſtands on the ſame principle with liberty of criticiſm, which the judges have often declared to be ſanctioned and protected by law. A piece may be hooted from the ſtage—as it may be cenſured and ridiculed in writing when it is publiſhed. An actor may be praiſed or condemned in a newſpaper or pamphlet for his theatrical performances. So he may be hiſſed or applauded at the moment, by thoſe who witneſs his efforts. Is the conduct of the *managers* then to be privileged from all animadverſion? Upon this in a great meaſure depend public amuſement, public taſte, and public morals. And how are the managers to be controuled, except by an unequivocal

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unequivocal manifeſtation of public opinion? From the ſyſtem of monopoly on which our theatres are governed, people cannot leave a theatre where they are ill uſed, and frequent another, which is conducted with more liberality. Their only remedy is to expreſs their diſapprobation in the hearing of the manager, and to bring him to terms of ſubmiſſion. This accordingly is the courſe which has been always purſued. Mr. *Garrick* and the firſt men who have undertaken the management of our theatrical concerns have hitherto chearfully yielded to the juriſdiction of the pit, without a thought of appealing to Weſtminſter Hall. Such is the generoſity as well as the diſcrimination of the Britiſh public, that there can be no danger of this power being converted to purpoſes of vexation or injuſtice. In the preſent inſtance, the managers of *Covent Garden Theatre* have done every thing to aggrieve and inſult the public, and the oppoſition to their tyranny has been marked by great moderation and forbearance. They have raiſed the prices of admiſſion moſt needleſsly; and according to the argument on the other ſide, had they inſiſted upon ſeven guineas for admiſſion to the boxes, inſtead of ſeven ſhillings, no one had any right to complain. Formerly, any of the gentlemen of the jury might have occupied the box in the theatre which the night before was honoured by the preſence of the SOVEREIGN himſelf and his auguſt family; but the managers have now attempted to exclude the public from a conſiderable part of the houſe, and to introduce invidious diſtinctions where there ought to be perfect equality. Yet there has been no ſuch violence exerciſed as has been formerly witneſſed on much leſs provocation—no pulling up of benches or breaking

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of chandeliers—no bloodſhed, or even breach of the peace. There is no pretence for denominating what the witneſſes have deſcribed *a riot*. The people were only expreſſing, according to antient uſage, their ſenſe of what they diſapproved. The noiſe was great, but not greater than is frequently heard at the condemnation of a new play. Bells and rattles may be new to the pit, but cat-calls, which are equally ſtunning, are as old as the Engliſh drama. Nor can the legality of the ſcene depend upon the exact degree of noiſe which is made by the audience, but whether outrage is committed, whether terror is excited, and whether the object is laudable. If the managers remain obſtinate and ſet at defiance milder expoſtulations, they muſt be brought back to their duty by louder remonſtrances; and there ſeem no juſt limits to neceſſary reſiſtance but a breach of the peace and a violation of property. The patentees do not hold the grant of the crown merely for their own emolument, but as the truſtees of the public; and they are anſwerable to the public for the manner in which they execute the truſt.—How could it be ſaid that the defendant had inſtigated this ſuppoſed riot? Whatever it was, it raged as furiouſly before he entered the houſe as afterwards. He took no part in the diſturbance, and inſtead of encouraging the ſuppoſed rioters, he prevailed upon a gentleman near him to deſiſt from blowing a trumpet. By wearing O. P. in his hat, he ſimply expreſſed his opinion, that the old prices were ſufficient and ought to be reſtored. If this were illegal, it would ſoon be a miſdemeanor to wear a blue cockade at an election, or a white favour at a wedding. The conduct of Mr. *Clifford* while he remained in

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in the pit was moſt exemplary.—But whatever difference of opinion there might be upon that ſubject,—ſuppoſe that he was there guilty of a riot and breach of the peace, the arreſt was equally illegal. At any rate, the riot had ceaſed, and he had withdrawn from the ſcene of action. He might as well have been dragged from his bed by the defendant and the other ſervants of the houſe, and carried before a magiſtrate, a month after the ſuppoſed offence had been committed. But it is an eſtabliſhed maxim of law, that though a conſtable or a private perſon may interpoſe to prevent a breach of the peace, or carry before a Juſtice a perſon apprehended by them in the act of breaking the peace; yet when the affray is over, their power is gone, and they cannot arreſt the offender without a warrant granted by a magiſtrate after an information laid before him upon oath. Therefore all the iſſues on the record muſt be found for the plaintiff. The defendant *was guilty* of the aſſault and falſe impriſonment laid to his charge, and guilty *without any ſuch cauſe* as he has alleged in his pleas of juſtification.

Shepherd, Serjeant, ſpoke at great length for the defendant; but as moſt of his legal arguments were adopted by the CHIEF JUSTICE, it ſeems unneceſſary to detail them.

Sir JAMES MANSFIELD, C. J.—The firſt great queſtion for the conſideration of the jury will be, whether the plaintiff was inſtigating a riot in *Covent Garden Theatre* on the evening in queſtion? and then they muſt determine, whether he was arreſted while the riot continued. As to the exiſtence of a riot in the

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houſe, no doubt can be entertained. It appears that for a great many nights there were riots there of ſuch a nature as go to put an end altogether to dramatic repreſentation. I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make ſuch a prodigious noiſe as to prevent others from hearing what is going forward on the ſtage. Theatres are not abſolute neceſſaries of life, and any perſon may ſtay away who does not approve of the manner in which they are managed. If the prices of admiſſion are unreaſonable, the evil will cure itſelf. People will not go, and the proprietors will be ruined, unleſs they lower their demands. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admiſſion they think moſt for their own advantage. It is ſaid, if the prices aſked are conſidered too high, people have a right to expreſs their diſapprobation in the tumultuous manner they have adopted. From this doctrine I muſt altogether diſſent. If the proprietors have acted contrary to the conditions of the patent, the patent itſelf may be ſet aſide by a writ of *ſcire facias* in the Court of Chancery. The private boxes furniſh as little ground for violence. The houſe is the property of a certain number of individuals, to be uſed by them according to their own diſcretion. I conceive it quite impoſſible that any thing which has been done by the managers in raiſing the prices, or making ſome of the boxes private, can be any ſort of juſtification in point of law for ſuch ſcenes as took place on the night in queſtion—ſcenes which are a diſgrace to the country, and which tend to bring us back to a ſtate of barbariſm,

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bariſm. If queſtions of this ſort are to be decided by multitudes of people aſſembling tumultuouſly, and behaving in ſuch a manner as to frighten decent members of ſociety from going to the theatre, there will be an end of the law. It is time for the public to underſtand; that the proceedings which have lately taken place at this theatre are in a high degree illegal, and that all thoſe who participate in them are liable to be puniſhed ſeverely, in proportion to their offences. Theſe premeditated and ſyſtematic tumults have been compared to that noiſe which has been at all times witneſſed at theatres in the immediate expreſſion of the feelings of the audience upon a new piece, or the merits or defects of a particular performer. The caſes, however, are widely different. The audience have certainly a right to expreſs by applauſe or hiſſes the ſenſations which naturally preſent themſelves at the moment; and nobody has ever hindered, or would ever queſtion, the exerciſe of that right. But if any body of men were to go to the theatre with the ſettled intention of hiſſing an actor, or even of damning a piece, there can be no doubt that ſuch a deliberate and pre-concerted ſcheme would amount to a conſpiracy, and that the perſons concerned in it might be brought to puniſhment. If people endeavour to effect an object by tumult and diſorder, they are guilty of a riot. It is not neceſſary, to conſtitute this crime, that perſonal violence ſhould have been committed, or that a houſe ſhould have been pulled in pieces. I am clearly of opinion that the ſcenes which have been deſcribed amount to a riot. How can it be ſaid there

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was no terror? Would any of the jury allow their wives or daughters to go to the theatre during theſe diſturbances? Muſt not thoſe who entertain a different opinion upon the matters in diſpute, and are friendly to the managers, expect to meet violent ill treatment? —The jury will conſider, then, whether Mr. *Clifford* was an inſtigator of the riot, which one of his witneſſes has repreſented as reſembling a quarrel among a thouſand drunken ſailors. The law is, that if any perſon encourages or promotes, or takes part in riots, whether by words, ſigns, or geſtures, or by wearing the badge or enſign of the rioters, he is himſelf to be conſidered a rioter, and he is liable to be arreſted for a breach of the peace. In this caſe, all are principals. It is not eaſy to conceive that the plaintiff had no intention to encourage the rioters. How happened it that at his entrance he was ſaluted with the exclamation, "Here comes the honeſt counſellor!" How had he deſerved this peculiar panegyric? How came it that a word from him was ſufficient to prevent a man from blowing a trumpet? For what purpoſe did he go to the theatre? Was it to ſee the play? Why did he wear O. P. in his hat? Did he not know the meaning of theſe letters; and if he did, with what view did he exhibit them but to encourage the mob by his example, and to impreſs upon them the idea they were acting agreeably to law? Upon all theſe circumſtances the jury will exerciſe their judgments, and conſider whether the plaintiff inſtigated the riot. If he in any way encouraged the rioters, he is guilty.—We now come to the moment of his apprehenſion. And the rule of law

law certainly is, that a private perſon cannot arreſt another for a mere breach of the peace at a time ſubſequent to the commiſſion of the offence, without a warrant from a magiſtrate. But there is ſome difficulty in determining when this power to arreſt actually ceaſes. Here if the riot had been over a conſiderable time, and the plaintiff had taken the O. P. out of his hat hours before, and there appeared no immediate danger of the riot being renewed, Mr. Brandon had clearly no right to arreſt him, without a warrant, for his paſt offence If, however, at the time of the arreſt, the riot which the plaintiff inſtigated ſtill continued, I think he may fairly be ſaid, under theſe circumſtances, to have been arreſted at the time of committing the offence. There is a contrariety of evidence as to this point, upon which the jury muſt determine.——His Lordſhip concluded by requeſting the jury to ſtate their opinion ſeparately as to the queſtions, whether the plaintiff had inſtigated the riot, and whether the riot was over before the arreſt.

The Jury, after retiring ſome time, found a verdict for the plaintiff, with 5l. damages; and being preſſed for their reaſons, the Foreman ſaid, they thought unanimouſly that the arreſt was illegal; but ſome of them proceeded on the ground that the riot was over, and others that the wearing the letters O. P. in a theatre was not any inſtigation to riot.

Beſt, *Runnington*, Serjeants, *C. Warren* and *C. Runnington*, for the plaintiff.

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Shepherd, *Lens*, Serjeants, and *Gurney*, for the defendant.

[Attornies, *Clarkſons* and *Humphreys*.]

In the preceding term the Court of K. B. granted leave to file a criminal information againſt Mr. Clifford and ſeveral other gentlemen who were repreſented as promoting the diſturbances in Covent Garden Theatre, for a *conſpiracy*; but before Hilary Term, the managers agreed, on the new price of admiſſion to the boxes being allowed, to reduce the price of admiſſion to the pit to its former ſtandard, to throw open to the public all the private boxes beyond the number which had exiſted in the old theatre, and to drop all the proſecutions which they had commenced.

Macklin, the famous comedian, indicted ſeveral perſons for *a conſpiracy* to ruin him in his profeſſion. They were tried before Lord MANSFIELD; and it being proved, that they had entered into a plan to hiſs him as often as he appeared on the ſtage, they were found guilty under his Lordſhip's direction; but the proſecutor declined calling upon them to receive the judgment of the Court.—I have not been able to find any authentic account of the trial.

ADJOURNED

ADJOURNED SITTINGS AT GUILDHALL.

JAMESON and others *v.* SWINTON.

Wednesday, Dec. 13.

If the drawer or indorser of a bill of exchange receives due notice of its dishonour from any person who is a party to it, he is directly liable upon it to a subsequent indorser from whom he had no notice of the dishonour.

ACTION by the second indorsees of a bill of exchange drawn by the defendant payable to his own order, and indorsed by him to *G. Elsom.*

The bill became due on Saturday the 8th of July, when it was in the hands of the plaintiff's bankers. On Monday the 10th, they returned it dishonoured to the plaintiffs, who in the evening of that day gave notice of the dishonour to *Elsom*, their indorser. *Elsom* between eight and nine o'clock in the evening of the following day, gave a like notice to the defendant. The plaintiffs and *Elsom* resided in *London*; the defendant at *Islington*. The question was, whether there was sufficient evidence of the dishonour of the bill to maintain the present action?

Best, Serjeant, for the defendant, insisted that the plaintiffs were bound to give notice themselves to the drawer and all the indorsers against whom they meant to have any remedy. They could not avail themselves of a notice given by a third person. Against *Elsom*, to whom they had given regular notice, they had a clear right of action; but they had no direct claim upon the defendant, to whom they had neither given notice nor attempted to give any. There could be nothing

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nothing in the difficulty of giving notice to a great number of indorſers, as the indorſee either knew them and their addreſs, or he truſted entirely to the credit of the perſon from whom he received the bill. Beſides, the defendant had not even received due notice of the diſhonour of the bill from *Elſom*. As the parties all reſided in London, or the immediate vicinity, the defendant was entitled to notice before 8 or 9 o'clock in the evening of the third day after the bill was diſhonoured.

LAWRENCE J.—I do not remember to have heard the firſt point made before; but I am of opinion that the drawer or indorſer is liable to all ſubſequent indorſees, if he had due notice of the diſhonour of the bill from any perſon who is a party to it. Such a notice muſt ſerve all the purpoſes for which the giving of notice is required. The drawer or indorſer is authoritatively informed that the bill is diſhonoured, he is enabled to take it up if he pleaſes, and he may immediately proceed againſt the acceptor or prior indorſers.—And it does ſeem to me that the defendant in this caſe had due notice of the diſhonour of the bill from *Elſom*. This is allowing only one day to each party, which, where the parties all reſide in the ſame town, ſeems now to be the eſtabliſhed rule.

Verdict for the plaintiff.

Shepherd, Serjeant, and *Selwyn*, for the plaintiff.

Beſt, Serjeant, for the defendant.

Vide Smith v. Mullett, *ante* 208.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Hilary Term,

50 GEORGE III.

FIRST SITTINGS IN TERM AT WESTMINSTER.

1810.

DAVIS *v.* HARDACRE.

Saturday, Jan. 27.

THIS was an action by the indorſee of a bill of exchange drawn by the defendant payable to his own order. The bill was dated 20th February 1809, for 700l. at 8 months after date.

In an action on a bill of exchange, if it appear that the plaintiff diſcounted it for the defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff to prove, that the goods were of the value at which they were eſtimated, for the purpoſe of rebutting the preſumption that the tranſaction was uſurious.

A *prima facie* caſe being made for the plaintiff,—uſury was ſet up as a defence to the action. And it appeared that the defendant being much preſſed for money, applied to the plaintiff to diſcount the bill in queſtion. The plaintiff refuſed to do ſo, except upon the following conditions: that the defendant ſhould take a banker's cheque for 250l. a promiſſory note at 2 months for 286l. 12s. and a landſcape in imita-

1810.
DAVIS
v.
HARDACRE.

tion of *Pouſſin* to be valued at 150l. The defendant agreed, and the bill was diſcounted accordingly.

Marryat for the defendant then offered to prove that the plaintiff had himſelf purchaſed the picture for 32l. and that this was its full value.

Lord ELLENBOROUGH.—I think it lies upon the plaintiff to prove that it is worth 150l.

Garrow for the plaintiff ſaid he was not prepared with evidence of the value of the picture; but contended that if the defendant was to make this an uſurious tranſaction, the *onus* was thrown upon him of proving that a groſsly extravagant and colourable price had been ſet upon the article—as had been done with reſpect to the oſtrich feathers, which were proved to be ſold and repurchaſed by the ſame money-lender ſeveral times in the ſame day.

Lord ELLENBOROUGH.—Where a party is compelled to take goods in diſcounting a bill of exchange, I think a preſumption ariſes that the tranſaction is uſurious. To rebut this preſumption, evidence ſhould be given of the value of the goods by the perſon who ſues on the bill. In the preſent caſe I muſt require ſuch evidence to be adduced: and I wiſh it may be underſtood that in ſimilar caſes, this is the rule by which I ſhall be governed for the future. When a man goes to get a bill diſcounted, his object is to procure caſh, not to encumber himſelf with goods. Therefore, if goods are forced upon him, I muſt have proof that they were eſtimated at a ſum for which he could

render them available upon a re-ſale, not at what might poſſibly be a fair price to charge to a purchaſer who ſtood in need of them. Can you ſhew that the defendant could have ſold your imitation of *Pouſſin* for 150l.?

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DAVIES v. HARDACRE.

Garrow allowed that though the rule juſt laid down by the CHIEF JUSTICE might bear hard againſt his client in this particular inſtance, its general operation would be moſt ſalutary.

Plaintiff nonſuited.

Garrow and *Beſt*, for the plaintiff.

Marryat and *Tindal*, for the defendant.

[Attornies, *Stokes* and *Wood*.]

Where goods are delivered to a perſon who wiſhes to raiſe money, a court of equity will ſet aſide the ſecurity, on payment of the ſum which the goods actually fetch when reſold. See Barker v. Vaniomner, 1 Bro. C. C. 149.

SECOND SITTINGS IN TERM AT WESTMINSTER.

Friday, Feb. 2.

MILMAN *v.* DOLWELL.

To treſpaſs for unmooring the plaintiff's barge the defendant having pleaded merely the *general iſſue*, cannot give in evidence that he removed it from a ſituation of danger by the plaintiff's authority; or that being frozen to the barge of a third perſon which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of ſafety.

THIS was an action of treſpaſs for cutting the plaintiff's barges from their moorings in the river Thames; whereby they had been ſet adrift and been injured.

It appeared that at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were moored, to the oppoſite ſhore, and that one of them was immediately after diſcovered to have a hole in its bottom, but there was no evidence to ſhew how this had been occaſioned.

Garrow for the defendant offered to prove, that at the time of the ſuppoſed treſpaſs theſe barges were in the greateſt danger of being carried away by the ice; that if he had not interfered, they moſt probably would have been deſtroyed; that he did what was moſt prudent and moſt for the plaintiff's advantage to be done under the circumſtances; and that he had been employed by the plaintiff generally to take charge of the barges, and muſt be preſumed to have had his authority to remove them from a place of danger to a place of ſafety.

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MILMAN v. DOLWELL.

Lord ELLENBOROUGH. — These facts should have been specially pleaded. I cannot admit evidence of them under the plea of *not guilty*;—the issue joined upon which is, whether the defendant removed barges belonging to the plaintiff from their moorings, not whether he was justified in doing so.

Garrow argued that the plea of *not guilty* merely denied the committing of any trespass, and it was impossible to say that any trespass was committed, if the barges were removed by the plaintiff's own orders either express or implied. The case was the same as if the plaintiff had stood by and directed how the thing was to be done, and the unmooring of the barges must be considered the act of the plaintiff rather than of the defendant.

Lord ELLENBOROUGH.—The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser; and if he has any matter of justification, he must put it upon the record. The plea of *not guilty* only denies the act done, and the plaintiff's title to the subject of the trespass. If the defendant has any authority, general or particular, express or implied from the plaintiff, this must be specially pleaded, by way of excuse.

Garrow then offered to prove that these barges were frozen to some others belonging to J. S., by whom the defendant was employed to get the latter ashore, and that it was utterly impossible to do this without bringing the former along with them.

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MILMAN v. DOLWELL.

Lord ELLENBOROUGH.—If the neceſſity was inevitable, and the barges of the third perſon by whoſe expreſs orders the defendant acted, muſt otherwiſe have been deſtroyed, this might have amounted to a juſtification; but, like the firſt ſet up, it muſt have been put upon the record.

The Jury found a verdict for the plaintiff, with *one farthing* damages.

Garrow afterwards moved for a new trial, on the ground that the evidence had been improperly rejected; and further contended, that the action ſhould have been caſe and not treſpaſs: but the court were againſt him on both points, and refuſed a rule to ſhew cauſe.

Park, *Jekyll*, and *Lawes*, for the plaintiff.

Garrow and *Topping* for the defendant.

[Attornies, *Evans* and *Hill*.]

Vide Com. Dig. Pleader (3 M. 20—39.) Bul. N. P. 90.

SECOND

SECOND SITTINGS IN LONDON.

BEVAN, Widow, *v.* HILL.

Saturday, Feb. 3.

A cheque given for ſtock ſold is loſt by the vendor in going home from the Stock Exchange: The purchaſer is immediately informed of this fact; but refuſes to pay without an indemnity: Four months after, the bankers on whom the cheque was drawn ſtop payment, with ſufficient money to anſwer it of the drawer's in their hands.—*Held*, that under theſe circumſtances an action would not lie for the price of the ſtock.

INDEBITATUS aſſumpſit for ſtock bargained and ſold, and for money had and received. Plea the general iſſue.

On the 27th of February 1809, the defendant purchaſed 70l. 5 per cents. belonging to the plaintiff for 69l. 7s. 6d., and the ſame day gave her a cheque for that ſum on his bankers, Meſſrs. *Walpole and Co.* She loſt the cheque on her way home from the Stock Exchange. He was immediately apprized of this fact, and at various times down to the month of June following was requeſted to pay for the ſtock; but he always refuſed to do ſo, unleſs he had an indemnity againſt his liability on the cheque. Meſſrs. *Walpole and Co.* became bankrupts in the month of May, in the ſame year, without the cheque having ever been preſented for payment. The defendant proved for the amount of the cheque under their commiſſion; but had not received any dividend at the time when the action was commenced.

Garrow for the plaintiff inſiſted that the cheque could not operate as payment of the ſtock, and that the defendant was ſtill bound to pay the 69l. 7s. 6d. without receiving any indemnity. Long before the

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BEVAN v. HILL.

commencement of the action, he had ceased to be liable on the cheque. According to the principle of *Tindal* v. *Brown*, 1 T. R. 167, after the bankruptcy of *Walpole and Co.* a holder of the cheque could not have maintained an action upon it against the drawer, and even in a short time from the loss of the cheque, and while *Walpole and Co.* continued to pay, it must have come into the hands of any person under circumstances of such suspicion, that *Brown* could not have been sued upon it, if he had withdrawn the money from the bankers, and paid it to the plaintiff.

Lord ELLENBOROUGH.—It is certainly possible that this cheque may have got into the hands of a person who might maintain an action upon it. The very day it was lost it might have been passed for value to a *bonâ fide* holder without notice. I therefore think the defendant was entitled to an indemnity. He could not, without this, have safely withdrawn the money from *Walpole and Co.* before their bankruptcy. He then ceased to be liable upon the cheque, but the money was gone. Besides, the bankruptcy of *Walpole and Co.* may not be sustainable, and the defendant is not to be exposed to the risk of the commission being superseded.

Plaintiff nonsuited.

Garrow and *Wigley* for the plaintiff.

Marryat for the defendant.

[Attornies, *Dixon*, and *Gregson & Dixon.*]

Vide Pierson v. Hutchinson, *ante* 211.

FIRST

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

BRADLEY *v.* GREGORY.

Tuesday, Feb. 13.

Where a man's creditors agree to take a compoſition on their reſpective debts, to be ſecured partly by the acceptances of a third perſon, and partly by his own notes, and to execute a compoſition deed containing a clauſe of releaſe, he cannot be ſued for the original debt due to a creditor who had promiſed to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refuſed to execute the compoſition deed after it had been executed by all the other creditors.

THIS was an action for goods ſold and delivered.—Plea, the general iſſue.

The original exiſtence of the debt demanded being admitted, the defence was reſted on the following facts:

In April 1808, after the ſale and delivery of the goods in queſtion, the defendant having fallen into embarraſſed circumſtances, a meeting of his creditors was called. This was attended by the plaintiff, and it was agreed by all preſent, that if a ſtatement the defendant then made was correct, they would accept of a compoſition and give him a releaſe. Two or three of the creditors were appointed to inſpect his books, and the meeting was adjourned to the next day. The plaintiff did not aſſiſt at the following meeting; but from the report then made of the defendant's affairs all the creditors preſent conſented to take a compoſition of 10s. in the pound on their reſpective debts, 7s. to be ſecured by the acceptances of *J. Broxhup* at one and three months, and the remaining 3s. to be paid by the defendant's own notes at 9, 12, and 15 months; and on theſe ſecurities being given, they were to execute a compoſition deed, containing a clauſe

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BRADLEY v. GREGORY.

of releaſe. The next morning, the defendant's attorney, before the drawing of the promiſſory notes, or the deed was begun to be prepared, waited upon the plaintiff to know whether he would come in under this arrangement. The plaintiff ſaid he was extremely glad it had been agreed to by the others, and promiſed to accept of the compoſition and to execute the deed. The deed was accordingly prepared and executed by the other creditors, and a tender was made to the plaintiff of bills accepted by *Broxhup* for 7s. in the pound, and of the defendant's own notes at the above dates for the remaining 3s. upon the ſum which the plaintiff had himſelf ſtated as the amount of his debt. But he now refuſed to accept of the bills and notes or to execute the deed.

Park for the defendant contended that after this agreement the preſent action could not be maintained, and relied upon *Butler* v. *Rhodes*, 1 *Eſp. N. P, Caſ.* 236.

Garrow and *Richardſon*, *contra*, maintained there was no caſe in which an executory agreement to accept a compoſition had been held to extinguiſh a debt. This was accord without ſatisfaction. However the plaintiff might *in foro conſcientiæ* be bound by his promiſe, and whatever effect might be given to it in a court of equity, yet at law, it could not be a bar to an exiſting right of action. In *Fitch* v. *Sutton*, 5 Eaſt. 230, where the compoſition had been received, the Court decided that the original debt was not extinguiſhed; and in the late caſe of *Steinman* v. *Magnus*, 11 *Eaſt*, 390,

390, 2 *Campb.* 124. in which it was held, that after a compoſition guaranteed by a third perſon has been actually received, the creditor cannot maintain an action for the reſidue of his demand, it ſeemed to be allowed on all hands that the mere agreement to receive a compoſition would have been no bar. In *Butler* v. *Rhodes* the defendant had been induced to aſſign the whole of his property to a truſtee, and was left without any means to ſatisfy the plaintiff's demand.

Lord ELLENBOROUGH.—I think the agreement in the preſent caſe operates as ſatisfaction. The defendant undertook to procure the acceptances of a third perſon for 7s. in the pound; to give his own notes for 3s. more; to prepare a compoſition deed with a clauſe of releaſe; and to procure the other creditors to execute it. The plaintiff undertook to accept of the compoſition, and to ſign the compoſition deed. There was clearly a good conſideration for this promiſe moving from the defendant to the plaintiff, as well in the benefit the latter was to receive, as in the inconvenience the other was to ſuffer. But it is ſaid this agreement is executory, and therefore can be no bar. I think it is executed. Every thing on the defendant's part was performed. As far as depended upon him, there has been ſatisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he ſtipulated for. Accord is no bar without ſatisfaction; but a party is not to be permitted to ſay there is no ſatisfaction, to whom ſatisfaction has been tendered according to the terms of the accord. It would be moſt unjuſt if the defendant could be ſued in this

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BRADLEY v. GREGORY.

action, and I am of opinion that in point of law the action is not maintainable.

Plaintiff nonsuited.

Garrow and *Richardson*, for the plaintiff.

Park and *Espinasse*, for the defendant.

[Attornies, *Wilson* and *Fillingham*.]

But although a creditor agree to take a composition, on a false representation that if he would compound, all the other creditors would do so likewise, if any of the others stand out, he is not bound by the agreement. Cooling v. Noyes, 6 T. R. 263. And an agreement between a debtor and his creditors, that they will accept a composition in satisfaction of their debts, if no fund be appropriated for the purpose of paying them, is *nudum pactum*, and cannot be pleaded to an action brought by one of the creditors for his whole demand. Heathcote v. Crookshanks, 2 T. R. 24.

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

DOE ex. d. ASH and another, *v.* CALVERT.

Wednesday Feb. 14.

Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waived.

THIS was an ejectment by landlords against tenant, to recover the possession of a house situate in *Gutter Lane, Cheapside.*

The demise was laid on the 29th June 1809, and the lessors of the plaintiff relied upon a notice to quit which expired on Midsummer day preceding.

The first question which arose was, whether the notice to quit had not been waved by a subsequent receipt of rent. It appeared that the rent for the premises had for several years been received by *Messrs. Gordon & Co.* on account of the landlord, and that a clerk of theirs at Michaelmas 1809 received a quarter's rent due for the quarter which then expired; but that he was then ignorant of the notice to quit having been given, or the ejectment having been brought, and that he accepted the rent without any special authority, imagining that matters remained between the parties on their former footing. There was no evidence of the rent having come to the hands of the lessors of the plaintiff.

Park

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DOE ex d. ASH and another v. CALVERT.

Park for the defendant inſiſted that the leſſors of the plaintiff were bound by the act of their agent, and that there was here an unequivocal acknowledgment of the tenancy ſubſequent to the day of the demiſe.

Lord ELLENBOROUGH.—The receipt of the rent due at Michaelmas is *prima facie* a waver of the notice to quit at Midſummer. But ſince it appears that this rent was received by an agent ignorant of the ſteps taken by his principal to determine the tenancy, and without any ſpecial authority to receive it, I am of opinion that the notice to quit remains in full force. If rents are uſually paid at a banker's, it would be too much to ſay that a tenancy is acknowledged by the banker receiving rent for the premiſes in the common routine of buſineſs after a notice to quit has expired (*a*).

A notice to quit is not *prima facie* evidence of the period of the year when the tenancy commenced.

A difficulty then aroſe to prove that this was a Midſummer holding.

Garrow, for the leſſors of the plaintiff, ſubmitted that it muſt *prima facie* be taken to be ſo, becauſe the notice to quit expired at that period of the year.

Lord ELLENBOROUGH.—It was once moſt improperly ſo held; but now I believe I may ſay all the

(*a*) *Vide* Doe v. Batten, Cowp. 243. Ward v. Willingale, 1 H. Bl. 311. Goodright v. Cordwent, 6 T. R. 219.

judges

judges are of a contrary opinion. To make the party's own act evidence in his favour is contrary to first principles (*a*).

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Doe ex d. Asse and another v. Calvert.

To shew the exact time when the defendant entered, it became necessary to prove the will of one *John Purcel*, who died seized in fee of the premises above 40 years ago. It was stated that he had devised them to his widow for life, and that she had demised them to the defendant by a lease which became void upon her death. The lessors claimed as devisees in trust of *Richard Purcel*, the brother of *John*, and remainder-man in fee after the life estate to the widow.

A will of lands being lost, the probate is not admissible as secondary evidence of its contents.

A Clerk from Doctor's Commons swore that he had searched in the proper place where the original will of *John Purcel* ought, according to its date, to have been found; but that it was no where to be discovered, and that he believed by some accident it was lost.

Garrow then tendered as secondary evidence the probate of the will under the seal of the ecclesiastical court.

Lord Ellenborough.—This is inadmissible. In the absence of the original will we should have had an examined copy. I cannot attach any authority to the probate as far as the will relates to real estate. A

(*a*) *Vide* Doe v. Vince, *ante*, 256.

will

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DOE ex d. ASH and another v. CALVERT.

will of lands does not require to be proved at all, and the eccleſiaſtical court has no controul over it. Therefore to ſhew that this is a true copy, we have only the ſeal of a court without juriſdiction upon the ſubject. The probate of a will deviſing real property is not like an office copy, which proves itſelf; for office copies that are received in evidence, are delivered out by officers appointed for the purpoſe as the organs of courts of competent juriſdiction.

Plaintiff nonſuited.

Garrow and *Puller*, for the leſſors of the plaintiff.

Park and *Eſpinaſſe*, for the defendant.

[Attornies, *Hunt* and *Earnſhaw*.]

In a caſe before WOOD, B. at the laſt *Worceſter Aſſizes*, on proof that a will of lands had been loſt, parol evidence of its contents was received from a witneſs who heard it read over before the teſtator's family on the day of his funeral.

HOLCOMBE *v.* HEWSON.

Wednesday, Feb. 14.

An agreement between a brewer and a publican, that the publican ſhall take all his beer of the brewer, cannot be enforced, unleſs the brewer ſupply the publican with good beer, ſuch as ought to give ſatisfaction to his cuſtomers. In an action on this agreement, the quality of the beer cannot be proved by ſhewing what ſort of a commodity the brewer furniſhed to other publicans during the ſame period.

THIS was an action of aſſumpſit by a brewer againſt a publican, on an agreement whereby it was ſtipulated that the defendant ſhould take all his beer of the plaintiff, and that if he did not, he ſhould pay an advanced rent for the houſe which he occupied.

Garrow for the plaintiff allowed (which was confirmed by Lord ELLENBOROUGH) that if it ſhould appear that the beer ſupplied by the plaintiff to the defendant while they dealt together, was not of a fair merchantable quality, and ſuch as ought to have given ſatisfaction to the defendant's cuſtomers, the preſent action could not be maintained.

To prove its excellence, the plaintiff's foreman was called, and ſtated that it was made of malt and hops only.

Garrow then propoſed to call ſeveral other publicans who dealt with the plaintiff at the ſame time with the defendant, and ſince the latter had taken his beer of another brewer, to ſwear that they were ſupplied with an excellent commodity, which was highly approved of by their cuſtomers.

Lord ELLENBOROUGH. This is *res inter alios acta*. We cannot here enquire into the quality of different beer

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HOLCOMBE v. HEWSON.

beer furnished to different persons. The plaintiff might deal well with one and not with the others. Let him call some of those who frequented the defendant's house, and there drank the beer which he sent in, or let him give any other evidence of the quality of this beer; but I cannot admit witnesses to his general character and habits as a brewer.

The defendant afterwards proved that the beer supplied to him by the plaintiff was very bad, and that he had lost almost the whole of his customers before he began to deal with another brewer; since which he has carried on a thriving trade.

The plaintiff submitted to be nonsuited.

Garrow and *Marryat* for the plaintiff.

Park and *Paley* for the defendant.

[Attorneys, *Townsend* and *Hodgson.*]

ADJOURNED

ADJOURNED SITTINGS AT WESTMINSTER.

CHAMBERS, ESQ. *v.* EAVES.

Saturday, Feb. 17.

A waggon returning from London loaded with dung, is not liable to be weighed and charged for overweight under 13 G. 3. c. 84. or 14 G. 3. c. 82. by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day.

TRESPASS for distraining a horse, and keeping the same till the defendant paid 22l. for the release thereof.—Plea *not guilty*.

The plaintiff has a farm at *Enfield*; and on the 19th of December last he sent a waggon from thence to London carrying, amongst other things, a basket filled with vegetables, and two bottles, one containing milk, the other cream, all the produce of the farm. The waggon having delivered these things at the plaintiff's house in town, took in a heavy load of dung to be carried back to Enfield, and the basket and bottles before mentioned being empty, were tied to the fore part of it with a hay rope.

When the waggon on the afternoon of the same day reached the *Islington* turnpike on its way home, the defendant, who collects the tolls there, insisted upon its being weighed. It was weighed accordingly, and found to be 35 cwt. above the statute weight. The defendant thereupon distrained one of the horses for the sum mentioned in the declaration, which he received next day from the plaintiff, when the horse was released. The question was, whether the waggon

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CHAMBERS v. EAVES.

ought to have been weighed on its way home, under theſe circumſtances?

Stat. 14 G. 3. c. 82. § 3. enacts, "that no waggon, cart, or carriage employed only in huſbandry, or carrying only manure or lime for the improvement of land, or hay, ſtraw, fodder or corn unthraſhed (excepting hay or ſtraw carried for ſale) ſhall be weighed at any weighing engine now or hereafter to be erected (*a*)."

Garrow for the defendant contended that the waggon carrying the empty baſket and bottles as part of its load, did not come within the exemption. The words of the ſtatute are "employed *only* in huſbandry, or carrying *only* manure or lime." If the baſket and bottles might be carried empty, without rendering the waggon liable to be weighed, ſo might they when full; and it would come to this, that every carriage would be exempted which carried any portion of manure as a part of its load.

Lord ELLENBOROUGH.—If the waggoner's frock were thrown over a waggon loaded with manure, would that render it liable to be weighed? If not, it is not every thing that is carried beſides the manure which will ſubject the owner of the waggon to the additional duty. We muſt look to the clauſe by which this is impoſed. Statute 13 G. 3. c. 84. § 1. enacts, that it ſhall and may be lawful for the truſtees of any turnpike road "to order and cauſe to be built

(*a*) And ſee 13 G. 3. c. 84. ſ. 6.

or

or erected a crane, machine or engine proper for the weighing of carts, waggons or carriages, conveying of *any goods or merchandize* whatsoever." Then can the empty basket and bottles be considered goods and merchandize within the meaning of the act of parliament? I think not. Care must be taken that the act is not evaded; but if the load substantially consists of manure, and manure only, the exemption will not be defeated by an article being tied to the waggon which cannot be considered as goods and merchandize, and which cannot produce the mischief against which the legislature meant to provide.

Verdict for the plaintiff.

Topping and *Abbott* for the plaintiff.

Garrow, *Marryat*, and *Richardson* for the defendant.

[Attornies, *Dewbery* and *Pinero*.]

Vide Harrison v. Brough, 6 T. R. 706.

Saturday, Feb. 17.

WRIGHT *v.* WALMSLEY.

Although it be irregular to bring an action on a bail bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of *non eſt factum*.

THIS was an action of debt on a bail bond conditioned for the defendant's appearance in the Palace Court.—Plea, *non eſt factum*.

Park contended, that the plaintiff muſt be nonſuited, as by 4 Ann. c. 16. the action could only be maintained in the Palace Court, and he relied upon *Donatty* v. *Barclay*, 8 T. R. 152.

Lord ELLENBOROUGH.—It is undoubtedly ſettled that an action on a bail bond ſhould be brought in the court where the writ was returnable on which the party was arreſted. That is the only court authorized by the ſtatute to give in a ſummary manner "ſuch relief to the plaintiff, the defendant, and to the bail as is agreeable to juſtice." Therefore, the plaintiff is irregular in bringing an action in the *King's Bench* on a bail bond taken on proceſs out of the *Palace Court*. But how am I to get at this under the plea of *non eſt factum*. The bond is the deed of the defendant, and is a valid deed. On a ſummary application to the court, proceedings might have been ſtayed, or perhaps the matter might have been taken advantage of by a ſpecial plea. The only iſſue we have now to try, however,

ever, is whether this be the defendant's deed? It is proved to be ſo, and there muſt be a—

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Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Willoughby* and *Bellamy*.]

But the ſheriff may ſue on a bail bond, in a different court from that in which the original action was brought. Newman v. Faucitt, 1 H. Bl. 631.

PRIDE, *q. t.* *v.* STUBBS.

Thurſday Feb 22.

THIS was an action of debt on 5 Eliz. c. 4. for ſetting to work, in the buſineſs of *a coachmaker*, a perſon who had not ſerved therein ſeven years as an apprentice.

An action will not lie on 5 Eliz. c. 4. for ſetting to work a perſon who had not ſerved an apprenticeſhip in the buſineſs of *a coachmaker*, that buſineſs not being known in England when the ſtatute paſſed.

The caſe being opened by the plaintiff's counſel,

Lord ELLENBOROUGH ſaid he was clearly of opinion the action could not be maintained, as the trade of a coachmaker did not exiſt in England in the 5th of Elizabeth (*a*). The Queen went on horſeback to open

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(*a*) 1562.

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the very parliament at which this ſtatute paſſed; and ſhe uſed frequently afterwards, on occaſions of ſtate, to ride behind the *Earl of Leiceſter*.

Plaintiff nonſuited.

Garrow and *Lawes* for the plaintiff.

Park and *Selwyn* for the defendant.

Coaches were uſed on the continent of Europe in the beginning of the 16th century; but were not known in England till the middle of Elizabeth's reign. According to *Stowe*, they were introduced from Germany by the *Earl of Arundel*.

Vide Coward v. Maberley, *ante*, 127. and the caſes there referred to.

Saturday, Feb. 24.

REX, *v.* LAMBERT and PERRY.

It is not libellous for a writer who allows the Sovereign to be ſolicitous for the welfare of his ſubjects, and who has no intention of calumniating him or of bringing his perſonal government into public odium, to expreſs regret that he has taken an erroneous view of any queſtion of foreign or domeſtic policy.—On the trial of an information for a libel in a newſpaper, the defendant has a right to have read in evidence any extract from the ſame paper connected with the ſubject of the paſſage charged as libellous, although diſjoined from it by extraneous matter and printed in a different character.

THIS was an information filed *ex officio* by the Attorney General againſt the printer and proprietor of the Morning Chronicle newſpaper, which charged that they "being ſeditious, malicious, and ill diſpoſed perſons, and being greatly diſaffected to our preſent ſovereign Lord, George the Third, &c. and to his adminiſtration of the government of this kingdom, and

moſt

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moſt unlawfully, wickedly, and maliciouſly deviſing, deſigning, and intending, as much as in them lay, to bring our ſaid Lord the King and his adminiſtration of the government of this kingdom and the perſons employed by him in the adminiſtration of the government of this kingdom, into great and public hatred and contempt among all his liege ſubjects, and to alienate and withdraw from our ſaid Lord the King the cordial love and affection, true and due obedience, fidelity, and allegiance of the ſubjects of our ſaid Lord the King; on &c. at &c. did unlawfully, ſeditiouſly, and maliciouſly print and publiſh, and cauſe, &c. a certain ſcandalous, malicious, and ſeditious libel of and concerning our ſaid Lord the King and his adminiſtration of the government of this kingdom, to the tenor and effect following, that is to ſay, '*What a crowd of* '*bleſſings ruſh upon one's mind, that might be beſtowed* '*upon the country, in the event of a total change of ſyſtem!* '*Of all monarchs indeed ſince the Revolution, the ſucceſſor* '*of George the Third will have the fineſt opportunity of* '*becoming nobly popular:*' To the great ſcandal, &c."

The defendants admitted that the paragraph ſet out in the information as a libel was publiſhed by them in the Morning Chronicle of 2d October 1809.

Mr. *Perry*, who conducted his defence in perſon, wiſhed another paragraph from the ſame paper to be read, by way of explaining the ſuppoſed libel.—The paragraph now propoſed to be read was at a conſiderble diſtance from the other, and printed in a different type, and there was ſome intelligence between the two

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of a totally extraneous nature, concerning the arrival and departure of fleets, &c.

The *Attorney General* obſerved that the paragraph pointed out could only be read *ex gratiâ*.

Lord ELLENBOROUGH.—If there be any parts of the ſame paper upon the ſame topic with the libel, or fairly connected with it, the defendants have a right to their being read, although locally disjoined from it. I cannot admit any thing totally foreign to the ſubject of the record to be read or made applicable to the defence. But paſſages of the ſame paper tending to ſhew the intention and mind of the defendants with reſpect to this ſpecific paragraph, muſt be very material for the conſideration of the jury. On the trial of Mr. *Horne Tooke* for high treaſon, the matter was carried much farther. The priſoner was allowed to read in his defence various extracts from works which he had publiſhed at a former period of his life, and theſe the jury were permitted to carry along with them when they retired to conſider of their verdict. I am not prepared to ſay that I ſhould go ſo far. I entertain the higheſt deference for the judges who preſided on that occaſion, and their authority is entitled to the greateſt weight; but if the point ſhould ever ariſe before me, it would become my duty ſeriouſly to conſider whether ſuch evidence ſhould be admitted. Here, however, I feel no heſitation. The paſſage alluded to will deſerve more or leſs attention according to its connexion with the ſubject matter of the libel; but its local ſituation and the character in which it is printed

printed furniſh no ground of objection to its being read.

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An extract was read accordingly, which concluded as follows: "The Prince has thought it his duty to "expreſs to his Majeſty his firm and unalterable de- "termination to preſerve the ſame courſe of neutra- "lity which he has maintained, and which, from "every feeling of dutiful attachment to his Majeſty's "perſon, *from his reverence of the virtues, and from "his confidence in the wiſdom and ſolicitude of his Royal "Father for the happineſs of his people*, he is ſenſible "ought to be the courſe that he ſhould purſue. We "have no doubt that this aſſurance of the filial reſpect "of the HEIR APPARENT, in not interpoſing his high "influence in the forming of an adminiſtration, will be "moſt acceptable to his Majeſty."

Lord ELLENBOROUGH in ſumming up to the jury, after commenting upon the weight to be given to this extract, which he thought ought to have been conſi- derable, if it had ſtood near the paſſage complained of, and they had formed parts of the ſame diſcuſſion, but which was greatly diminiſhed by their diſtance from each other, and the matters interpoſed between them— proceeded to ſay: The next and moſt important queſ- tion is, what is the fair, honeſt, candid conſtruction to be put upon the words ſtanding by themſelves? Is the paſſage ſet out in the information, *per ſe* libellous? The firſt ſentence eaſily admits of an innocent inter- pretation. "What a crowd of bleſſings ruſh upon "one's mind that might be beſtowed upon the coun-

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"try in the event of a total change of ſyſtem?" The fair meaning of the expreſſion, "*change of ſyſtem*," I think is, a change of political ſyſtem—not a change in the frame of the eſtabliſhed government—but in the meaſures of policy which have been for ſome time purſued. By total change of ſyſtem is certainly not meant *ſubverſion* or *demolition*; for the deſcent of the crown to the ſucceſſor of his Majeſty is mentioned immediately after. The writer goes on to ſpeak of the bleſſings that may be enjoyed upon the acceſſion of the Prince of Wales; and therefore cannot be underſtood to allude to a change inconſiſtent with the full vigour of the monarchical part of the conſtitution. Now I do not know that merely ſaying, there would be bleſſings from a change of ſyſtem, without reference to the period at which they may be expected, is expreſſing a wiſh or a ſentiment that may not be innocently expreſſed in reviewing the political condition of the country. The information treats this as a libel on the perſon of his Majeſty, and his perſonal adminiſtration of the government of the country. But there may be error in the preſent ſyſtem, without any vicious motives, and with the greateſt virtues, on the part of the reigning Sovereign. He may be miſled by the miniſters he employs, and a change of ſyſtem may be deſirable from their faults. He may himſelf, notwithſtanding the utmoſt ſolicitude for the happineſs of his people, take an erroneous view of ſome great queſtion of policy, either foreign or domeſtic. I know but of ONE BEING to whom error may not be imputed. If a perſon who admits the wiſdom and the virtues of his Majeſty, laments that in the exerciſe of theſe he has taken an unfortunate

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nate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say or insinuate, that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of Government obtains under his Majesty's reign I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. —Then comes the next sentence: "Of all monarchs indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." This is more equivocal; and it will be for you, gentlemen of the Jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that his Majesty, during his reign, or

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or any length of time, may have taken an imperfect view of the intereſts of the country, either reſpecting our foreign relations, or the ſyſtem of our internal policy—if it imputes nothing but honeſt error, without moral blame, I am not prepared to ſay that it is a libel. The extract, read at the requeſt of the defendants, does ſeem to me too remote in point of ſituation in the newſpaper, to have any material bearing on the paragraph in queſtion. If it had formed a part of the ſame diſcuſſion, it muſt certainly have tended ſtrongly to ſhew the innocence of the whole. It ſpeaks of that which every body in his Majeſty's dominions knows, his Majeſty's ſolicitude for the happineſs of his people, and it expreſſes a reſpectful regard for his paternal virtues. What connexion it has with the paſſage ſet out in the information, it is for you to determine. Taking that paſſage ſubſtantively and by itſelf, it is a matter, I think, ſomewhat doubtful, whether the writer meant to calumniate the perſon and character of our auguſt Sovereign. If you are ſatisfied that this was his intention by the application of your underſtandings honeſtly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the ſame paper, you will find the defendants *guilty*. But if, looking at the obnoxious paragraph by itſelf, you are perſuaded that it betrays no ſuch intention; or if, feeling yourſelves warranted to import into your conſideration of it a paſſage connected with the ſubject, though conſiderably diſtant in place and disjoined by other matter, you infer from that connexion that this was written without any purpoſe to calumniate the perſonal government

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government of his Majeſty, and render it odious to his people, you will find the defendants *not guilty*. The queſtion of intention is for your conſideration. You will not diſtort the words, but give them their application and meaning as they impreſs your minds. What appears to me moſt material is the ſubſtantive paragraph itſelf; and if you conſider it as meant to repreſent that the reign of his Majeſty is the only thing interpoſed between the ſubjects of this country and the poſſeſſion of great bleſſings, which are likely to be enjoyed in the reign of his ſucceſſor, and thus to render his Majeſty's adminiſtration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not ſee that it means diſtinctly according to your reaſoning, to impute any purpoſed mal-adminiſtration to his Majeſty, or thoſe acting under him, but may be fairly conſtrued as an expreſſion of regret that an erroneous view has been taken of public affairs, I am not prepared to ſay that it is a libel. There have been errors in the adminiſtration of the moſt enlightened men. I will take the inſtance of a man, who for a time adminiſtered the concerns of this country with great ability, although he gained his elevation with great crime—I mean OLIVER CROMWELL. We are at this moment ſuffering from a moſt erroneous principle of his government in turning the balance of power againſt the Spaniſh monarchy in favour of the Houſe of Bourbon. He thereby laid the foundation of that aſcendency which, unfortunately for all mankind, France has ſince obtained in the affairs of Europe. The greateſt monarchs who have ever reigned—monarchs who have

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have felt the moſt anxious ſolicitude for the welfare of their country, and who have in ſome reſpects been the authors of the higheſt bleſſings to their ſubjects, have erred. But could a ſimple expreſſion of regret for any error they had committed, or an earneſt wiſh to ſee that error corrected, be conſidered as diſparaging them, or tending to endanger their government? —Gentlemen, with theſe directions the whole ſubject is for your conſideration. Apply your minds candidly and uprightly to the meaning of the paſſage in queſtion; diſtort no part of it for one purpoſe or another; and let your verdict be the reſult of your fair and deliberate judgment.

Verdict *not guilty*.

The *Attorney-General*, *Garrow*, *Abbott*, and *Richardſon* for the Crown.

[Attornies, *Litchfield* and *Lowten*.]

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

SKRINE *v.* ELMORE.

Monday, Feb. 26.

A receipt for the price of a horſe containing a warranty of ſoundneſs may be read in evidence to prove the warranty, without an agreement ſtamp.

ACTION on the warranty of a horſe.

To prove the warranty, the plaintiff gave in evidence a written inſtrument ſigned by the defendant, which had a receipt ſtamp, and contained a receipt for the price of the horſe, with the words ſubjoined, "*warranted ſound.*"

The defendant's counſel objected, that it could not be read in evidence for the purpoſe of proving the warranty, without an agreement ſtamp.

Dampier of counſel for the plaintiff ſaid, Mr. Juſtice LAWRENCE had ruled that ſuch a receipt might be received in evidence to prove the warranty, as well as the payment of the price of the horſe, if it had a receipt ſtamp merely; as the warranty came within the exception in the 4th ſection of 23 Geo. 3. c. 58, being an agreement "relating to the ſale of goods, wares, and merchandizes." (*a*)

(*a*) Brown v. Frye, Devon Sum. Aſſ. 1809.

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Lord ELLENBOROUGH assented to this doctrine when the receipt was found to have both a receipt stamp and an agreement stamp.

Garrow and *Dampier* for the plaintiff.

Park for the defendant.

[Attornies, *Sands* and *Fielder*.]

So a written agreement by a broker who buys goods for his principal to indemnify him for any loss arising on the resale, need not be stamped. Curry v. Edmison, 3 T. R. 524. But an agreement for goods to be made, or the produce of land to be grown, does not come within the exemption. Buxton v. Bedall, 3 East 303. Waddington v. Bristow, 2 Bos. & Pul. 452.

Monday. Feb. 26.

HENKIN *v.* GERSS.

An action cannot be maintained on a wager on a point of law in which the parties have no interest.

THIS was an action of assumpsit on a wager, "whether a person may be lawfully held to bail on a special original for a debt under 40l."

The pleadings being opened,—

Lord ELLENBOROUGH requested to see the record, and having perused it, he threw it down with much displeasure, saying,—I certainly will not try this cause. Let either party apply to the Court next term if any one thinks that it is a cause fit to be tried. I sit here to

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to decide points of law that arise incidentally before me, and the decision of which is necessary for the purposes of justice; not to state my opinion upon any question submitted to me from idle curiosity. I have no difficulty in saying, that an action will not lie on a wager on a point of law in which the parties have no interest. If any legal question could be raised in this manner for judicial determination, the inconvenience would be intolerable; and I consider the attempt extremely indecent.

In the ensuing Term, *Park* on behalf of the plaintiff submitted to the Court, that as the bet was not immoral, the action was maintainable, and the cause ought to be tried.—But

The Judges all agreed that the parties having no interest in the point of law, the action could not be maintained, and that the trial had been properly stopped.—They refused, however, to grant a rule for judgment as in case of a nonsuit, as there had been no default on the part of the plaintiff in not proceeding to trial.

Park and *Puller* for the plaintiff.

Garrow for the defendant.

So a cause coming on to be tried before Lord LOUGHBOROUGH, in which the plaintiff declared on a wager, "whether "there are more ways than six "of nicking seven on the dice, "allowing seven to be the main, "and eleven a nick to seven," his lordship ordered it to be struck out of the paper, and the Court of C. P. afterwards refused leave to restore it. Brown v. Leeson, 2 H. Bl. 43.

Thurſday, March 1.

ADLINGTON *v.* APPLETON.

Where an action is brought to recover the balance of an account, a particular of the plaintiff's demand delivered under a judge's order ought to give the defendant credit for payments admitted to have been made by him, and to ſtate the exact ſum which the plaintiff goes for.—
If an attorney delivers a particular containing only the debtor ſide of the account, he may be made to pay the coſts ſubſequently incurred in the action.

THIS was an action for work and labour, to recover a ſum of about 10l., being the balance of an account of long ſtanding between the parties.

Under a Judge's order, the plaintiff had delivered a particular of his demand, which contained an account for buſineſs done to the amount of 200l. but gave the defendant no credit for payments now admitted to have been made.

Lord ELLENBOROUGH.—This particular is a contempt of the authority of the Court. The plaintiff was bound to ſtate the preciſe ſum he ſought to recover, and for this purpoſe to have given the defendant credit for all payments made on account. Such a particular miſleads the defendant, inſtead of giving him the information to which he was entitled. Had he known that a balance of 10l. was all the plaintiff went for, he might very probably have paid that ſum into Court. It is moſt unjuſt that under theſe circumſtances the defendant ſhould be burthened with the coſts of the action. I think it right that the plaintiff ſhould take a verdict for his balance, without coſts. If this is not agreed to, I will direct an application to be made

to.

to the Court, who will moſt likely order the plaintiff's attorney to pay the coſts on both ſides.

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The propoſal was accepted.

Adolphus for the plaintiff.

Park for the defendant.

GREEN and others, Aſſignees, &c. *v.* JONES.

Saturday, March 3.

In an action by the aſſignees of a bankrupt, the petitioning creditor is not a competent witneſs to ſupport the commiſſion, although he may be called on the other ſide to prove it invalid.

IN this caſe, notice had been given under 49 Geo. 3. c. 121. § 10. that the defendant meant to diſpute the act of bankruptcy.

To prove this, a witneſs was called, who appeared to be the petitioning creditor himſelf.

Garrow for the defendant objected to his competency.

Topping, *contra*, contended that the petitioning creditor was not diſqualified to give evidence in ſupport of the commiſſion, as it is not neceſſarily the intereſt of a creditor that the debtor, though inſolvent, ſhould be made a bankrupt (*a*), and as the witneſs had no more intereſt in this action than any other creditor.

(*a*) Williams v. Stevens, *ante* 300.

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Lord ELLENBOROUGH.—I am of opinion that the witneſs is incompetent. I remember a caſe in which I was myſelf counſel, and in which the petitioning creditor was called to upſet the commiſſion. I objected to his competency, on the ſcore that he had a ſtrong intereſt to ſupport it; that he was to be conſidered in ſome ſenſe as a party to the cauſe, and that to examine him on the other ſide was holding out a lure to his conſcience. However, the Judge at Niſi Prius held that he was a competent witneſs; and Lord Chancellor THURLOW, by whom the iſſue had been directed, afterwards declared himſelf of the ſame opinion. But I conceive that the petitioning creditor is not a competent witneſs to ſhew that the commiſſion was regularly ſued out. He enters into a bond to the Lord Chancellor, conditioned to eſtabliſh the ſeveral facts upon which the validity of the commiſſion depends, and to cauſe it to be effectually executed (*a*). He has, therefore, a clear and direct intereſt in the queſtion at iſſue.

Plaintiff nonſuited (*b*).

Topping, *Yates*, and *Littledale* for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Ellis* and *Lowten*.]

(*a*) 2 Cooke's B. L. 3.
(*b*) *Vide* 49 G. 3. c. 121. § 14.

MERLE

MERLE and others *v.* JOHN WELLS.

Saturday, March 2.

Where by a written guarantie, A. becomes bound to B. for any debt C. may contract with him, no exceeding 100l. the guarantie is not extinguished by one dealing between B. and C. to that amount; but extends to any debt of 100l. which C. may afterwards owe to B.

THIS was an action of assumpsit on the guarantie contained in the following letter from the defendant to the plaintiffs, dated 9th June 1807:

"Gentlemen,

"I have been applied to by my brother William "Wells, jeweller, to be bound to you for any debts "he may contract, not to exceed one hundred pounds "(with you) for goods necessary in his business as a "jeweller. I have wrote to say by this declaration, "I consider myself bound to you for any debt he "may contract for his business as a jeweller not ex-"ceeding one hundred pounds after this date.

(Signed) "John Wells."

The plaintiffs continued to supply *William Wells* with goods in his business above a twelvemonth afterwards to a considerable amount, during which time they several times balanced accounts with him, and he paid them above the sum of 100l. The question was, whether the defendant's guarantie was limited to the first hundred pounds for which the plaintiffs gave credit to *William Wells*, or extended to any sum of that amount which he should thereafter owe them for goods supplied to him in the business of a jeweller.

Garrow contended for the former interpretation. The parties evidently contemplated one dealing to the

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amount of 100l. If not, when was the defendant's responsibility to ceaſe. He could not mean to bind himſelf and his executors during his brother's life. The debt had been ſatisfied for which the defendant became bound, and the guarantie was extinguiſhed before the goods were delivered for which this action was brought.

Lord ELLENBOROUGH. I think the defendant was anſwerable for any debt not exceeding 100l. which *William Wells* might from time to time contract with the plaintiffs in the way of his buſineſs. The guarantie is not confined to one inſtance, but applies to debts ſucceſſively renewed. If a party means to be ſurety only for a ſingle dealing, he ſhould take care to ſay ſo. By ſuch an inſtrument as this, a continuing ſuretiſhip is created to the ſpecified amount. There muſt therefore be a ——

Verdict for the plaintiffs for 100l.

Park and *Marryat* for the plaintiffs.

Garrow and *Comyn* for the defendant.

[Attornies, *Lamb* and *Edmonds*.]

Vide Maſon v. Pritchard, *poſt*.

BUTLER

BUTLER *v.* HEANE.

Saturday, March 3.

It is not ſufficient notice to limit the common law reſponſibility of a carrier, for him to paſte upon the door of his office where goods are received and delivered, a bill blazoning the advantages of his conveyances, and ſtating in ſmall characters at the bottom of it, that he will not be anſwerable for goods above the value of 5l. unleſs entered as ſuch and paid for accordingly.

THIS was an action againſt a common carrier for the loſs of a trunk delivered to him for the purpoſe of being carried from *Cheltenham* to *London*.

Defence, that the trunk was above the value of 5l. and had not been entered or paid for as ſuch, according to a notice for this purpoſe.

It appeared that the defendant is owner of a waggon which travels from *Glouceſter* to *London*, through *Cheltenham*. At the waggon offices in *London* and *Glouceſter*, there is a board with large letters painted upon it, giving the uſual notice. But at *Cheltenham* the only mode taken to publiſh this notice was by nailing upon the office door a hand-bill, ſtating in large print the many advantages belonging to the waggon, and in a very ſmall character at the bottom, that the owner would not be anſwerable for goods above the value of 5l., unleſs entered as ſuch, and paid for accordingly.

Lord ELLENBOROUGH.—This is not enough to limit the defendant's common law liability. We have not ſufficient evidence of any ſpecial contract. The jury ought to believe that at the time when the trunk was delivered at the waggon office at *Cheltenham*, the plaintiff or his agent there ſaw, or had ample means of ſeeing, the terms on which the defendant carries

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on his buſineſs. How can this be inferred from the hand bill nailed on the door, which called the attention to every thing that was attractive, and concealed what was calculated to repel cuſtomers? If a common carrier is to be allowed to limit his reſponſibility, he muſt take care that every one who deals with him is fully informed of the limits to which he confines it.

Verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Park for the defendant.

[Attornies *Sudlow* and *Orrel*.]

Vide Cobden v. Bolton, *ante* 108.

Tueſday, March 6.

FORTUNE *v.* LINGHAM.

If goods are delivered generically of the ſort ordered, the price cannot be recovered back in an action for money had and received as upon a failure of conſideration, however bad their quality may be, and although they are quite unfit for uſe.

ASSUMPSIT on a warranty, that goods ſold were equal to ſample, with a count for money had and received.

The goods conſiſted of ſtock fiſh; and ſeveral witneſſes ſwore that they were worm-eaten, putrid, and wholly unfit for human uſe; but no ſufficient evidence could be adduced of the warranty.

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Park for the plaintiff contended, that he might recover back the price, as money had and received, the conſideration having entirely failed.

Lord ELLENBOROUGH.—If, inſtead of ſtock fiſh, the defendant had delivered to the plaintiff a quantity of ſaw-duſt, the price might be recovered back in the manner propoſed. But ſtock fiſh were delivered, though ſeemingly in very bad condition; and you cannot be permitted to cry whether they were of a good or bad quality, whether they were fit or unfit for uſe, in an action for money had and received. For this purpoſe a ſpecial count was indiſpenſible.

Plaintiff nonſuited.

Park and *Puller* for the plaintiff.

Garrow for the defendant.

[Attornies, *Winter* and *Dann*.]

Vide Power v. Wells, Cowp. 818. Weſton v. Downs, Doug. 23. Towers v. Barrett, 1 T. R. 133.

WILLIAMSON and another *v.* BENNETT and MITCHELL.

Tueſday, March 6.

DECLARATION againſt the defendants as makers of a promiſſory note for 200l.

An inſtrument acknowledging the receipt of drafts for the payment of money and promiſing to repay the money, is a ſpecial agreement and not a promiſſory note.

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The inſtrument produced was in following form, with a promiſſory note ſtamp;

"Borrowed and received of J. and J. Williamſon "(the plaintiffs) the ſum of 200l. in three drafts by "W. and B. Williamſon, dated as under, payable to "us W. Bennett and S. Mitchell on J. and J. Wil- "liamſon, which we promiſe to pay unto the ſaid J. "and J. Williamſon with intereſt. As witneſs this "26th day of Auguſt 1802.

"Auguſt 26th, 1 draft at 2 months £.120
——— 1 do. ——— 30
——— 1 do. ——— 50

£.200
W. Bennett.
S. Mitchell."

Garrow objected that this was an agreement, not a promiſſory note, and that it could not be received in evidence without an agreement ſtamp.

Park, *contra*, inſiſted that it was merely a promiſſory note, expreſſing the conſideration for which it was given, viz. money advanced by the plaintiff. The firſt part of it concerning the drafts, amounts to no more than the common expreſſion, "*value received*," which uſually comes at the end of a promiſſory note. This is a promiſſory note either payable on demand from the date of it, or after the drafts on the plaintiffs were due, and the declaration contains counts in both ways.

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Lord ELLENBOROUGH. I think that this is a special agreement, and not a promiſſory note. There can be no doubt that the money was not payable immediately, and that it was not to be paid at all, unleſs the drafts were honoured. The tranſaction on the face of the inſtrument is evidently this: the plaintiffs were to advance money to the defendants, for which this was to be a ſecurity, binding on the defendants after the money had been received. The defendants do not abſolutely promiſe to pay 200l., but the 200l. they were about to borrow. All the ambiguity would be removed by reading "which we promiſe to *pay*," "which we promiſe to *repay*." I cannot admit the inſtrument as a promiſſory note.

Plaintiff nonſuited.

Park, *Marryat*, and *Barrow* for the plaintiffs.

Garrow and *Littledale* for the defendants.

[Attornies, *Kearſey* and *Battye*.]

Vide Leeds v. Lancaſhire, *ante* 205.

DE METTON

Friday, March 9.

DE METTON and another *v.* DE MELLON.

A Frenchman domiciled at *Lisbon* consigns a cargo which is his property to *Nantes*, under the name of a native Portugueze, who acts as '*neutralizer*.' The ship being taken and brought into an English port, the cargo is libelled in the court of Admiralty: The Portugueze, with the privity of the Frenchman, claims it, and it is decreed to be delivered up to him as neutral property.—*Held*, that an action at law could not afterwards be maintained by the Frenchman against the Portugueze to recover the proceeds of the cargo.

MONEY had and received.

De Metton was born in France, and the other plaintiff in *Switzerland*. They had carried on trade for some time in partnership at *Lisbon*, and were domiciled there. During the present war they consigned a cargo by a Portuguese ship called the *Felicidad* from *Lisbon* to *Nantes*. This was their property; but the papers respecting it were made out in the name of *De Mellon*, the defendant, a native Portuguese subject, who acted upon the occasion as "*Neutralizer*."—The *Felicidad* was captured by an English cruizer, and her cargo libelled in the High Court of Admiralty. A claim was then put in by the agent of *De Mellon* with the privity of the plaintiffs, and the cargo was ordered to be restored to him as Portuguese property. It was for the proceeds of this cargo, which the defendant had acknowledged he had received, that the present action was brought.

The *Attorney General* contended, that the plaintiffs had a clear right to recover, as the money was undoubtedly theirs, and there was nothing illegal in the transaction to prevent them from asserting their rights in an English Court of justice. The voyage from *Lisbon* to *Nantes* was sanctioned by the law of nations. The plaintiffs, being domiciled in Portugal, had

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a right to trade to any part of France. The adventure might have been carried on in their own names, and could not be vitiated by the ſubſtitution of the name of a native Portugueſe ſubject. The object of that moſt probably was, to lull ſuſpicion and to prevent capture; but the plaintiffs had only to guard againſt groundleſs ſuſpicion and unjuſt capture. If theſe facts had been eſtabliſhed in the Admiralty Court, there could be no doubt that a reſtitution would have been ordered to the plaintiffs directly. *De Mellon*, however, was only their agent, and was liable for the amount of the cargo as money had and received to their uſe.

Lord ELLENBOROUGH.—What would have been done in the Court of Admiralty on proof of theſe facts it is not for me to determine; but thoſe who have procured an adjudication in that court to another perſon, ſhall not be permitted here to claim the ſame property as belonging to themſelves. *De Mellon*, a native Portugueſe merchant, being ſet up as the real owner of the cargo of the *Felicidad*, the Court of Admiralty was impoſed upon, and might be prevented from thoroughly inveſtigating the circumſtances of the caſe. Perhaps upon farther inquiry the property might have turned out to belong neither to the conſignor nor the "*neutralizer*," but to the conſignee at Nantes. At all events, parties cannot have the aſſiſtance of our courts in carrying on this ſyſtem of deception, and the plaintiffs cannot maintain an action at law for that which they have ſolemnly declared to be the property of the defendant.

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The plaintiffs were nonsuited, and the Court of K B. next term refused a rule to shew cause why the nonsuit should not be set aside.

The *Attorney General*, *Garrow*, and *Bosanquet* for the plaintiffs.

Park and *Topping* for the defendant.

[Attornies, *Pearce*, and *Kaye & Freshfield.*]

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METCALFE and others *v.* BRUIN.

A bond of indemnity given to the trustees of a public unincorporated insurance company, conditioned for the good conduct of a clerk while in the service of the *said company*, remains in full force during the period the clerk continues to serve the company, although there be changes among the individual members of whom the company is composed.

DEBT on bond, dated 18th June 1803, in the penal sum of 2,000 l. with the following condition:

"Whereas T. H. Wilkinson is chosen and admitted "into the service of the Globe Insurance Company, "the condition of this obligation is such, that if the "said T H. Wilkinson do and shall, from time to "time, and at all times hereafter, during his continu- "ance in the said service of the said company, faith- "fully, honestly, diligently, and carefully execute, "perform, and discharge the said service, and all and "every other services of the said company, wherein "he is, shall, or may be employed, or whereunto he "is, shall, or may be called, and shall, so soon as he "shall be thereunto required, give and deliver in "writing a just and true account of all monies, notes, "bills,

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"bills, &c. which in the ſaid ſervice ſhall come to the "hands of the ſaid T. H. Wilkinſon, or which he ſhall "be entruſted with by or on account of the ſaid com- "pany, and alſo make good, anſwer for, and pay the "monies due on the balance of ſuch account to the "ſaid company, or ſuch perſons as the ſaid company, "or the court of directors thereof for the time being, "ſhall appoint, and ſhall and do, moreover, well and "ſufficiently ſave harmleſs and keep indemnified the "ſaid company, and the directors and all other mem- "bers thereof, from and againſt all loſſes, &c. for or "by reaſon of any matter, &c. done or omitted to be "done by the ſaid T. H. Wilkinſon in or during his "ſaid ſervice; then this obligation to be void, &c."

The defendant after craving oyer pleaded; 1ſt, Non eſt factum: 2dly, Performance.

The replication to the 2d plea aſſigned various breaches of the condition by *Wilkinſon* from the 1ſt of January 1804 to the commencement of the ſuit;—which were denied by the rejoinder.

It appeared that the plaintiffs were five of the truſtees of *The Globe Inſurance Company*; that this company is unincorporated, but that four years after the date of the bond the members obtained two acts of parliament to enable them to ſue and be ſued in the name of their treaſurer; that there has been a continual fluctuation in the members of the company; that in the years 1803, 4, and 5, many old members went out

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and new ones came in; and that there were generally upwards of a hundred changes in the courſe of a year.

The Attorney General for the defendant contended, that as ſoon as there was any change among the members of the company, the bond was at an end. The *Globe Inſurance Company*, not being a corporation, is like any other partnerſhip or mercantile firm, and there is no point of law better eſtabliſhed than that a bond conditioned for the good conduct of a clerk to any partnerſhip, ceaſes to operate the moment an old member goes out of the partnerſhip, or a new one comes in. The notion that the ſecurity is given to the *houſe* and not to the individuals compoſing it, has been long exploded. The defendant might have great confidence in the prudence and diligence of ſome of the members of the Globe Inſurance Company who retired, and he might have ſuch an opinion of the negligence and folly of ſome who bought in, that he would by no means have become bound for a clerk under their ſuperintendance. But none of the breaches were proved. By the words "*ſaid Company*" in the condition, muſt be underſtood, the Company in exiſtence at the execution of the bond; and that Company had ceaſed to exiſt, and another partnerſhip was formed, before any of the money had been received by *Wilkinſon* which he had not brought to account.

Lord ELLENBOROUGH.—Where a bond of indemnity is given for the conduct of a clerk in a banking houſe,

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houſe, or any common partnerſhip, the law is clearly as it has been laid down, and the inſtant there is a change in the firm, the indemnity is at an end. But *The Globe Inſurance Company* is neceſſarily a flux body; and its conſtitution muſt have been contemplated when the bond was given. This, like other contracts, muſt be conſtrued according to the intention of the contracting parties. I think the obligor muſt be taken to have meant *The Globe Inſurance Company for the time being*, and I am therefore of opinion that his reſponſibility is not affected by a change among the members of which it is compoſed.

The plaintiff had a verdict, and the enſuing term the Court of K. B. diſcharged a rule which they had granted to ſhew cauſe why there ſhould not be a new trial.

Garrow and *Taddy* for the plaintiffs.

The *Attorney General*, *Park*, *Wigley* and *Comyn* for the defendant.

[Attornies, *Kaye* and *Noy*.]

Vide Arlington v. Merricke, 2 Saund. 412. Wright v. Ruſſel, 2 Black. Rep. 934. 3 Wilſ. 532. S. C. Barker v. Parker, 1 T.R. 287. Barclay v. Lucas, *ib.* 291 *n.* Myers v. Edge, 7 T.R. 254. Strange v. Lee, 3 East 484. Dance v. Girdler, 1 New Rep. 34.

Thurſday, May 3.

De Bernales *v.* Fuller and others.

In an action for money had and received to recover a ſum paid by a third perſon into the defendant's hands for the plaintiff's uſe, the plaintiff is not entitled to intereſt.—The rule upon this ſubject in *De Havilland v. Bowerbank*, 1 *Campb.* 50. confirmed by th Court of K. B.

THIS was an action for money had and received, to recover the ſum of 894l. 16s. 9d. and intereſt thereupon, under the following circumſtances:

The plaintiff was holder of a bill of exchange, for that amount, accepted payable at the banking houſe of the defendants. The bill became due the 23d of September laſt, and on that day the clerk of the acceptors paid in money at the defendants' banking houſe for the purpoſe of taking it up. The acceptors happened at this time to be indebted to the defendants; and the latter, inſtead of paying the money to the plaintiff as holder of the bill, inſiſted that they had a right to apply it in ſatisfaction of the balance due to themſelves from the acceptors.

It being ſettled that this was money had and received by the defendants to the uſe of the plaintiff as holder of the bill,—

The *Attorney General* inſiſted that he was entitled to intereſt upon the 894l. 16s. 9d. from the 23d of September to the time of ſigning final judgment, —which amounted to 28l. 13s. This was a liquidated demand; payment had been requeſted; the defendants had no doubt made intereſt of the money; the plaintiff

plaintiff certainly would have turned it to advantage, had it been duly paid to him; therefore, according to the rules of juſtice and of law, the plaintiff was entitled to a compenſation, in the ſhape of intereſt, for the injury he had ſuffered by the money being withheld from him.—But

Lord ELLENBOROUGH decided, that as there was no contract, either expreſs or implied, to pay intereſt in this caſe, intereſt could not be allowed. His Lordſhip again laid down the rule as it is ſtated in *De Havilland v. Bowerbank*, 1 *Campb.* 50.; and having no doubt upon the point, refuſed to ſave it; but requeſted the *Attorney General*, if he thought the direction erroneous, to bring the matter before the court.

Accordingly the plaintiff had a verdict only for the principal money; and when the term came, the *Attorney General* ſubmitted to the Court of K. B. that the ſum being liquidated, he was entitled to intereſt after a demand of payment.—But

The Judges all agreed that intereſt ought not to have been given.—LE BLANC, J. mentioned with diſapprobation the circumſtance of Mr. *Juſtice Buller* having allowed intereſt on policies of inſurance, and ſaid, that the debt being liquidated, was not now the rule by which intereſt was recoverable.

Nothing was taken by the motion.

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The *Attorney General* and *Wigley* for the plaintiff.

Garrow for the defendants.

Q. Whether intereſt would be allowed in an action for not giving a bill of exchange in payment of goods ſold, from the time when the bill, if given, would have become due?—Intereſt has very recently been given in ſuch a caſe by the *Court of Exchequer Chamber*, where the practice ſeems now to be to allow intereſt only if intereſt was recoverable below.

Becher and another v. Jones (*in error*)—*Exchequer Chamber*, *Saturday*, 26*th May*, 1810.—The declaration ſtated, that the plaintiff ſold and delivered to the defendants twenty bales of cotton, for the price of 709*l.* 17*s.* 6*d.* to be paid for at the expiration of four months from ſuch ſale and delivery, by giving a bill of exchange to the plaintiff, payable two months after the giving thereof; but that the defendants had not given a bill, or paid for the goods. There were other ſpecial counts in the declaration, and counts for goods ſold and delivered. After judgment by default, and a writ of enquiry executed, a writ of error was brought, on which there was judgment for the defendant in error this term.

Littledale now moved, that it might be referred to the Clerk of the Errors, to calculate the amount of the intereſt upon the final judgment obtained in this cauſe, from the time of the ſervice of the allowance of the writ of error until the affirmance of the ſaid judgment in this court, and that ſuch intereſt might be added to the damages for which ſuch final judgment was entered up.

Campbell, contra, allowed, that by 3 Hen. 7. c. 10. and 19 Hen. 7. c. 20. the court had authority to give intereſt by way of damages on the affirmance of a judgment in every caſe; but ſubmitted that the practice of the *Exchequer Chamber* now was, to give intereſt only in caſes where a debt was recovered which carried intereſt of itſelf. Though they once had allowed intereſt in an action of *tort*, (*Lord Lonſdale v. Littledale*, 2 *H. Bl.* 267.) and in an action on an attorney's bill, (*Shepherd v. Mackreth*, 2 *H. Bl.* 284.) theſe deciſions had been diſapproved of; and, ſubſequently, intereſt had been refuſed in an action on an attorney's bill (*Walker v. Bailey*, 2 *Boſ. & Pul.*

Pul. 219.) where the court ſaid, that ſimilar applications had been frequently made and rejected; and in a ſtill later caſe, (*Briſtow v. Waddington*, 2 *New Rep.* 355.) it was laid down, that intereſt ſhould not be allowed upon affirmance of a judgment in an action for not performing a contract. In ſuch an action as the preſent, intereſt could not be allowed by the jury. The notion that a liquidated demand carries intereſt has been ſome time exploded, and intereſt can only be given on debts payable on a certain day, as promiſory notes and bills of exchange, or where there is a contract either expreſs or implied to pay intereſt. This is no more than the common caſe of goods ſold and delivered.

Sir J. MANSFIELD, C. J.—You allow that if you had given the bill in part performance of your agreement, you muſt have paid intereſt pending the writ of error. Then, are you to be placed in a better ſituation by refuſing to give the bill, and performing no part of the contract? This would be moſt unjuſt. I am of opinion that intereſt ought to be allowed in the ſame manner as if the action had been brought on a bill accepted in payment of the goods.

THOMPSON, B.—According to the rule you contend for, we ought to allow intereſt upon the affirmance of the judgment; as this, I conceive, is a debt which carries intereſt of itſelf, and intereſt from the time the bill would have become due, ought to have been given on the execution of the writ of inquiry.

The other judges aſſenting,

Rule granted.

Since the laſt caſe was ſent to the preſs, the court of K. B. has determined, that intereſt ought not to be allowed in an action for goods ſold and delivered, to be paid for at a certain day.

Gordon and others v. Swan and others, K. B. 30 *May* 1810.

Taddy moved for a rule to ſhew cauſe why the inquiſition executed in this caſe ſhould not be ſet aſide, on account of a miſdirection of the under-ſheriff. The action was for goods ſold by the following contract:

"London, 9 Sept. 1808.
"Sold for account Meſſrs.
"Gordon & Murphy—
"To Swan, Anderſon, & Co.
"About 150 tons Spaniſh
"copper, at 84 l. per ton, to be
"received in 14 days; *payable*
"*at ſix months.*"

The principal had been paid after the commencement of the action; and the queſtion was, Whether intereſt ought to be allowed from the expiration of the ſix months for which the credit was given? The under-

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ſheriff directed the jury, that they could not give intereſt, particularly as the plaintiff had not declared ſpecially.—*Taddy* now contended that intereſt ought to have been allowed, as the money was payable on a certain day. He relied on *De Havilland v. Bowerbank*, 1 *Campb.* 51. where Lord ELLENBOROUGH is repreſented to have ſaid that intereſt ſhould be allowed "where there "is a contract for the payment "of money on a certain day, as "on bills of exchange, promiſ-"ſory notes, &c." and *Mountford v. Willes*, 2 *Boſ. & Pul.* 337. in which the court of C. P. expreſsly decided, that in a contract for the ſale of goods, if any particular time be limited for payment of the price, the vendor is entitled to intereſt on the price from that time.—But

Lord ELLENBOROUGH obſerved, that if intereſt was allowed in this caſe, it muſt be allowed in almoſt every action for goods ſold; as it generally happens, that either by the uſage of trade or by expreſs ſtipulation between the parties, credit is given for a ſpecific time; and that what he ſaid in *De Havilland v. Bowerbank* muſt be taken to refer to written inſtruments, ſuch as promiſſory notes and bills of exchange, which are there put as examples. There muſt be ſome fixed rule upon the ſubject, although occaſional hardſhip may be produced, as it is impoſſible to enter into the equitable circumſtances of each particular caſe.—His lordſhip expreſſed a wiſh that a bill of exceptions ſhould be tendered, if the rule by which he had always acted was conſidered contrary to law, and if it could not be denied to be law, that thoſe who diſapproved of it ſhould apply to the legiſlature.

LE BLANC, J.—If intereſt were allowed here, intereſt muſt be given in every caſe for goods ſold, at leaſt from the commencement of the action till the time of ſigning final judgment.

BAILEY J.—The ſix months credit is for the benefit of the purchaſer, and means, that he ſhall not be arreſted or ſued till the expiration of that time; and in *Mountford v. Willes* the court of C. P. did not decide that intereſt ought to have been given, but merely refuſed to ſet aſide the verdict becauſe intereſt was included in the damages.

Rule refuſed.

MACKENZIE

MACKENZIE v. SHEDDEN.

Friday, May 4.

THIS was an action on a policy of insurance on the freight of the American ship *Lexington*.

The policy was dated 29th July 1808, and was filled up as follows, the *italicks* denoting the words which were in writing: "at and from *Sheerneſs in* "*ballaſt to Charente and back to a port in the Britiſh* "*Channel and London*, upon the ſaid ſhip and *freight* "*at and from the date hereof*, and ſo ſhall continue "and endure during her abode there, &c. and further "until the ſaid ſhip with all her ordnance, &c. ſhall "be arrived at *Charante and back at a port in the* "*Channel and London*. At and after the rate of *ten* "*guineas per centum on freight valued at the ſum in-* "*ſured to be deemed intereſt on the outward voyage*, "*although in ballaſt, to pay outfit, ſeamen's wages, and* "*proviſions, &c. for the voyage.*"

The declaration, after ſtating the defendant's ſubſcription to the policy, ſet out a charter-party, dated 11th July 1808, between the captain of the *Lexington* and one *Chriſtopher Idle*, for a voyage from *Sheerneſs* to *Charente* in ballaſt, and back to *London* with a cargo of brandy; whereby the charterer covenanted to ſend alongſide the ſhip at *Charente* a full cargo of brandy, and to pay freight for the ſame at the rate of 7l. 10s.

Policy "at and from *Sheerneſs* in ballaſt to *Charente*, and back to a port in the Britiſh Channel and London; from the date thereof, till the ſhip ſhould be arrived at *Charente* and back at a port in the Channel and London; on *freight* valued at the ſum inſured, to be deemed intereſt in the outward voyage, altho' in ballaſt." The ſhip was freighted for the voyage in queſtion by a charter party, whereby ſhe was to proceed to *Charente* in ballaſt, and there the freighter was to provide her with a full cargo of brandy. On the arrival of the ſhip at *Charente* ſhe was put under an embargo, and after being ſo kept for ſix months, ſhe was ſeized and condemned by the French government.—*Held*, that the freight was protected by the policy while the ſhip lay at *Charente* before any goods were put on board, and that the underwriters were liable for a loſs ſo happening.

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7l. 10s. per ton. The declaration afterwards alleged that the ship arrived at *Charente* on the 29th of August following; that from her arrival till the 17th of January 1809, she was detained and prevented from departing; that she was then seized and taken possession of by the persons exercising the powers of government there, and that by reason of this detention and seizure, the brandy in the charter-party mentioned was not sent alongside the ship, and the captain was prevented from earning and obtaining the said freight, and the same was thereby wholly lost to the owner of the ship, being the person interested therein.

It appeared that from the arrival of the *Lexington* at *Charente* there actually was an embargo on all American ships, and that she was eventually seized and condemned for having come from an English port.

Park for the assured contended, that this case came directly within *Thompson v. Taylor*, 6 T. R. 478. in which it was laid down, that though the commencement of the risk on *freight* is generally from the taking of the goods on board, yet that where the ship is to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing for that place. Therefore, a ship having sailed from London to Teneriffe to take in a cargo for the West Indies, and having been lost before she arrived at the port of loading, the insurers on freight were held liable.

The *Attorney-General*, *contra*, allowed that had the loss in this case happened on the outward voyage, the

action could not have been defended; but he inſiſted that the underwriters were not liable *during the ſtay of the veſſel at Charente*, until the goods were begun to be loaded. Although there might be an exception to the general rule upon the ſubject, that could only ariſe from a ſpecial contract, the words of which muſt receive a ſtrict interpretation. The inſurance here was declared to be "on freight, to be deemed intereſt *on the outward voyage*, although in ballaſt," without any mention of the ſhip's ſtay at the loading port, which was therefore left as in ordinary caſes. From the ſhip's arrival, till ſhe began to load, the policy was ſuſpended. The underwriters never undertook that the French government would ſanction the intercourſe between *Charente* and *London*, and would have acted very fooliſhly if they had. Were they to continue anſwerable if the embargo had laſted ſeveral years? — But there was another objection equally fatal, that the ſhip had actually lain ſix months at *Charente* without a ſingle caſk of brandy being put on board. Suppoſing the underwriters liable during the whole of her ſtay there, that liability could not be indefinitely protracted. The embargo prevented the ſhip ſailing, but did not prevent her from taking in her cargo. Therefore the charterer, or his agents, were bound to load her without delay according to the terms of the charterparty, ſo that ſhe might be ready to ſail the moment the embargo was removed. This event might have happened at any moment before the ſeizure; and was the riſk of the underwriters to be unneceſſarily continued from thence till the loading ſhould be completed?

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Lord ELLENBOROUGH.—It would be meaſuring out the law with great ſeverity to hold, that they were bound to load the ſhip during the embargo, when it was ſo doubtful whether ſhe would ever be allowed to ſail, and the probability was that ſhe would ultimately be ſeized with all the goods found on board. I think the underwriters have no defence upon this ground.—Looking merely to the words at the bottom of the policy alluded to by the defendant's counſel, I ſhould have thought it very doubtful whether the freight was meant to be inſured from the arrival of the ſhip at *Charente*, to the beginning to take goods on board. Although I have never hitherto met with a policy by which the reſponſibility of the underwriters was ſuſpended and the riſk was divided into two diſcontinuous halves, ſuch a policy may doubtleſs be framed. But when I conſider all the words inſerted in this policy, I am of opinion that it was meant to cover the ſubject matter inſured, without any intermiſſion, during the whole of the adventure. The inſurance is ſtated to be *at and from Sheerneſs to Charente and back to London upon freight from the date thereof*, to continue till the ſhip ſhould be arrived at *Charente and back at a port in the Channel and London.* There might be great riſk of the veſſel being prevented from loading, and being ſeized by the French Government before any goods were put on board; but it ſeems impoſſible to ſay that this was a peril for which the underwriters did not render themſelves reſponſible. The laſt clauſe in the policy muſt be referred to the former, and the great object of the whole will then appear to have been, to preſerve the integrity of the riſk,

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risk. From the moment the outward voyage commenced, till the ship's return with the brandy, the underwriters have undertaken to indemnify the ship owner for any thing that should prevent the ship from earning her freight on the voyage insured. I therefore think they are liable for a loss happening in the manner alleged and proved. But as there is some novelty in the point, I will give you leave to move to enter a nonsuit, if upon consideration you think you can with any prospect of success.

The plaintiff had a verdict, which was acquiesced in.

Park and *Parnther* for the plaintiff.

The *Attorney General*, *Garrow*, and *Marryat* for the defendant.

Vide Horncastle v. Suart, 7 East, 400. Forbes v. Cowie, 1 Campb. 520. Knox v. Wood, *Ib.* 543.

OXFORD CIRCUIT.

LENT ASSIZES, 50 GEORGE III.

WORCESTER.

Coram WOOD, B.

1810.

MASON *v.* S. PRITCHARD.

A guarantie for the payment of any goods to be supplied to a third person to a specified amount, remains in force after goods to this amount have been supplied and regularly paid for, until the surety gives notice that he will be no longer responsible.

THIS was an action of assumpsit upon a guarantie in the following form:

"I hereby promise to be responsible to *Thomas* "*Mason*, of the city of *Worcester*, tea dealer, for any "goods he hath or may supply my brother *William* "*Pritchard* of *Hay*, in the county of *Brecon*, to the "amount of 100l. As witness my hand, 27th October "1807.

"Stephen Pritchard."

It appeared that the plaintiff, after this guarantie, had furnished goods to *William Pritchard* above the value of a 100l., for which he had been regularly paid; and that, continuing to deal with him, he supplied

plied him with the goods for which the preſent action was brought.

Abbott contended, that the defendant's reſponſibility was at an end when the plaintiff had been paid for goods to the amount ſupplied to William Pritchard, after the guarantie, and that the defendant could not be ſuppoſed to have guaranteed his brother's ſolvency to an indefinite period and after he had become notoriouſly inſolvent.

WOOD, B.—After goods to the amount of 100l. had been ſupplied and paid for, perhaps the defendant might have got rid of his liability for any goods to be ſubſequently furniſhed to his brother, by giving the defendant notice that he would be no longer reſponſible. But until ſuch notice was given, I am clearly of opinion that the guarantie remained in force.

Verdict for the plaintiff.

In the enſuing term *Abbott* moved to enter a nonſuit; but the Court of K. B. thought that the inſtrument declared upon was a continuing guarantie, and refuſed a rule to ſhew cauſe.

Dauncey and *Wigley* for the plaintiff.

Abbott for the defendant.

Vide Oxley v. Young, 2 H. Bl. 613. Marle v. Wells, *ante* 413.

STAFFORD.

Coram LAWRENCE, J.

Friday, March 30.

M'ALLESTER *v.* HADEN.

An action lies on a wager on a horse-race, if neither of the sums betted by the parties amounts to 10 l. and the race itself is run for the sum of 50 l. or upwards.

ACTION upon a wager on a horse-race.

It appeared that the plaintiff betted the defendant four guineas to six, that *Bob Booty* should win the King's plate, of the value of 100 guineas, at the Litchfield races in 1808; and that *Bob Booty* won accordingly.

LAWRENCE, J. was of opinion that the bet being under the sum of 10l., and therefore not contrary to 9 Ann. c. 14., and the race being for upwards of 50l. and therefore not contrary to 13 Geo. 2. c. 19. the action well lay, and——

The plaintiff had a verdict.

Dauncey and *Campbell* for the plaintiff.

Jervis for the defendant.

Although this point has not been expresly ruled before, Lord KENYON, in *Good v. Elliott*, 3 *T. R.* 705. incidentally declared

declared himself of opinion that such a wager is valid; and in *Bulling v. Frost*, 1 *Esp. Cas.* 236. his lordship held that an action might be maintained to recover the sum of 3l. 10s. lost by the defendant to the plaintiff at the game of *All Fours*. But if the sum betted on a horse-race by either of the parties be above 10l. an action will not lie on the wager. Goodburn v. Morley, 2 Stra. 1159. Blaxton v. Pye, 2 Wilf. 309. Clayton v. Jennings, 2 Bl. Rep. 706. So although the sums betted be under 10l. if the horse-race is run for a sum less than 50l. the law is the same. Johnson v. Bann, 4 T. R. 1. And even where the sum run for is above 50l. a wager on the race is illegal, unless it be a bona fide contest between two or more horses running on the turf. Ximenes v. Jaques, 6 T. R. 499. Whaley v. Pajot, 2 Bos. & Pul. 51.

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[It may be useful to insert the following note here, though out of the order of time, for the purpose of correcting a general misconception upon a point of frequent recurrence.]

SITTINGS IN EASTER TERM AT GUILDHALL.

PFIEL & VANBATENBERG.

Wednesday, May 17.

ACTION for money lent.

The plaintiff's case was, that he had accepted and paid several bills of exchange for the defendant's accommodation.—The bills were produced by the plaintiff, and proved to have been drawn by the defendant. They were likewise *receipted* in the usual form of bills paid; but it did not appear by whom the receipts were written.

The production of a bill of exchange from the custody of the acceptor, is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted.—Nor is payment to be presumed from a receipt indorsed on the bill, unless this receipt is shewn to be in the hand-writing of a person entitled to demand payment.

Richardson contended, that the simple production of the bills by the acceptor was *prima facie* evidence of payment. They could not have got into his hands unless he had paid them; and the presumption that an instrument in the possession of the person liable

upon

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PFIEL v. VANBATENBERG.

upon it, is satisfied, has been invariably acted upon. But the receipts indorsed on these bills put the matter beyond all doubt, as the defendant was guilty of forgery, if the bills had not been paid; and the law would not presume that a man had committed a capital offence.

Lord ELLENBOROUGH.—Shew that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible that when they were left for acceptance, he refused to deliver them back, and having detained them ever since, now produces them as evidence of a loan of money.—Nor do I think the receipts carry the matter a bit farther, unless you shew them to be in the hand-writing of the defendant, or some other person authorized to receive payment of the bills. A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; and it is possible that though the bills are unsatisfied, these receipts may have been fraudulently indorsed without the plaintiff's privity. The fact of payment still hangs *in dubio*, and you must do something more to turn the balance. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment. If you do not, the plaintiff must be called.

However, a witness afterwards swore that the defendant had acknowledged the debt, and the plaintiff had a verdict.

Richardson for the plaintiff.

Garrow for the defendant.

In an action by the drawer against the acceptor of a bill of exchange, if the plaintiff produces the bill with a general receipt on the back of it, this is *prima facie* evidence that the bill was paid,—not by the plaintiff,—but by the defendant. Scholey v. Walsby, Peak. Cas. 25.

Payment of Money may be proved, by the lender producing a cheque drawn by him upon his bankers in favour of the borrower, and indorsed by the latter; but without the indorsement, it is no evidence. Egg v. Barnett, 3 Esp. Cas. 196.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K.B.

At the Sittings in and after Easter Term,

50 GEORGE III.

FIRST SITTINGS IN TERM AT WESTMINSTER.

1810.

Monday May 14.

LIPSCOMBE *v.* HOLMES, Esq.

If a medical practitioner passes himself off as a physician, although he has no diploma and no right to assume that character, he cannot maintain an action for his fees.

THIS was an action for work and labour as a surgeon, and for curing the defendant and several persons of his family, of divers diseases and maladies, under which they had respectively laboured and languished. The defendant pleaded the general issue, and paid 3*l.* 13*s.* 6*d.* into court.

The first defence set up was, that the plaintiff was a physician, and therefore could not maintain an action for his fees. It appeared that he wrote prescriptions, was called "*Doctor*," and signed himself M. D.

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LIPSCOMBE v. HOLMES.

Park said he should shew, that at the time when the visits were paid, for which the action was brought, the plaintiff was only a surgeon; and that he had not taken out his diploma as a physician till long after.

Lord ELLENBOROUGH.—If a person passes himself off as a physician, he must take the character *cum onore*. When he brings an action for visits paid by him as a physician, I will give him credit for being so, and tell him he must trust to the honour of his patients. Whether the plaintiff had or had not a diploma when he attended the defendant, is immaterial. Whatever he was, if he at that time wrote prescriptions and added M. D. to his name, he must be nonsuited.

Park then produced the rule for paying money into court, which his lordship thought removed the objection, and admitted the plaintiff's right to sue as a surgeon.

It was afterwards agreed to withdraw a juror.

Park and *Espinasse* for the plaintiff.

Garrow and *Agar* for the defendant.

[Attornies *Pasch* and *Railton*.]

Vide Chorley v. Balcot, 4 T. R. 317. in which it was first decided that a regular physician cannot maintain an action for his fees. It has been long settled that such an action cannot be maintained by a barrister. Moor v. Row, Cha. Rep. 38.—Nor is a barrister

ter liable for groſs ignorance or negligence. Fell v. Brown, Peak. 96. Nor to refund a fee given him to argue a cauſe, which he does not attend. Turner v. Philips, ibid. 122. But a ſurgeon is liable for ignorance, as well as for negligence. Slater v. Baker, 2 Wilſ. 359. Seare v. Prentice, 8 Eaſt, 348. Bull. N.P. 73.

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LIPSCOMBE. v. HOLMES.

LUCAS v. WINTON.

Monday, May 14.

THE plaintiff declared as indorſee, againſt the defendant as maker, of a promiſſory note for 53*l.* 18*s.*, dated 22d February 1809.

After the 1ſt day of February 1809, a promiſſory note was given for an antecedent debt. Held, that as againſt the payee, the maker would have been diſcharged under the inſolvent debtors act, 49 Geo. III. c. 115; but that he was not, as againſt a perſon to whom the note was ſubſequently indorſed.

In addition to the general iſſue, the defendant pleaded, in diſcharge of his perſon, that having been confined in the King's Bench priſon on the 1ſt of February 1809; he was afterwards diſcharged under the inſolvent debtor's act, 49 Geo. III. c. 115; and that the ſums of money mentioned in the declaration, were contracted before the ſaid 1ſt day of February, mentioned in the ſaid Act.

It appeared that the note was originally given by the defendant to one *Boon*, as a ſecurity for a debt due before 1ſt February 1809; but that it was indorſed to the plaintiff for a valuable conſideration after that day.

Reader for the defendant contended that the iſſue on *the inſolvent debtor's act*, muſt be found for him, as the note muſt have reference back to the conſide-

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LUCAS v. WINTON.

ration for which it was given; and the debt for which the action was really brought clearly came within the deſcription of thoſe from which the legiſlature intended that the perſon of the debtor ſhould be diſcharged.

Lord ELLENBOROUGH. — Had the action been brought by the payee, I ſhould have been ſtrongly inclined to think, that the iſſue muſt have been found for the defendant. As to *Boon*, the debt certainly exiſted before the 1ſt of February. But how can I ſay that he was then indebted to the preſent plaintiff? The debt for which the plaintiff now ſues, did not exiſt till after the ſecurity was indorſed to him, or at leaſt, not till the 22d of February, when the note was drawn.

The plaintiff had a verdict on both iſſues.

Garrow, and *Littledale* for the plaintiff.

Reader for the defendant.

Vide Macdonald v. Borington, 4 T. R. 825.

THIRD

THIRD SITTINGS AT GUILDHALL.

1810.

Monday, May 28.

WOOLSEY *v.* D. CRAWFORD.

The acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal ſum, together with intereſt according to the legal rate of intereſt where the bill is payable.

THIS was an action on a bill of exchange, drawn by *I. S. Crawford* at *Quebec*, upon, and accepted by the defendant in England. The declaration ſtated that the plaintiff, who was payee of the bill, had indorſed it in *Canada*, and that in conſequence of its returning to that country diſhonoured, he had been compelled to pay to the indorſee 10*l.* per cent. upon the amount as re-exchange, and 6*l.* per cent. intereſt from the time it became due, together with other charges.

Park undertook to prove theſe facts, and contended that the defendant was anſwerable for all the damage that had been ſuffered by the plaintiff, from the bill being diſhonoured.

Lord ELLENBOROUGH.—You may as well ſtate that by reaſon of the bill not being paid, the plaintiff was obliged to raiſe money by mortgage. You muſt proceed for re-exchange againſt the drawer. He undertakes that the bill ſhall be paid, or that he will indemnify the holder againſt the conſequences. The acceptor's contract cannot be carried farther, than to

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pay the ſum ſpecified in the bill, and intereſt according to the legal rate of intereſt where it is due.

Verdict accordingly.

Park and *Puller* for the plaintiff.

The cauſe was undefended.

[Attornies *Lewis* and *Wharton*.]

Vide Napier v. Shneider, 12 Eaſt, 420.

AD-

ADJOURNED SITTINGS AT WESTMINSTER.

1810.

Thurſday, June 7th.

JACKSON *v.* HUDSON.

If a bill of exchange be accepted by the drawee, another perſon who, for the purpoſe of guaranteeing his credit, likewiſe accepts the bill in the uſual form, is not liable as acceptor, but muſt be ſued upon his collateral undertaking.

THIS was an action againſt the defendant as acceptor of a bill of exchange, which was drawn and accepted in the following form:

London, 30th December 1809.

Two months after date, pay to my order 157*l.*, for value received,

F. Jackſon.

To Mr. I. Irving.

Accepted I. Irving.
Accepted Joſ. Hudſon, payable at Mr. Hudſon's, 132 Oxford Street.

The firſt count of the declaration ſtated, that the bill was directed to *Irving*; the ſecond took no notice of there being any drawee; and both averred that the defendant accepted it, "according to the "uſage and cuſtom of merchants."

Garrow for the plaintiff ſtated, and undertook to prove, that the plaintiff having dealings with *Irving* concerning the ſale of goods, refuſed to ſell him any more, unleſs the defendant would become his ſurety; that the defendant agreed to this; that goods to the value of 157*l.* were in conſequence ſold by the plain-

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JACKSON v. HUDSON.

tiff to *Irving*; that the bill in queſtion was drawn for the price of them, and that the defendant with a knowledge of all theſe facts, had put his name upon the bill as acceptor. He muſt therefore be conſidered as having accepted the bill jointly with *Irving*; and as he had not pleaded in abatement, he was ſeparately liable in the preſent action.

Lord ELLENBOROUGH.—If you had declared, that in conſideration of the plaintiff ſelling the goods to *Irving*, the defendant undertook that the bill ſhould be paid, you might have fixed him by this evidence. But I know of no cuſtom or uſage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is *contrary* to the uſage and cuſtom of merchants. A bill muſt be accepted by the drawee, or failing him, by ſome one for the honour of the drawer. There cannot be a ſeries of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as ſuch.

Plaintiff nonſuited.

Garrow and *Marryat* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies *Humphries* and *Hannam*.]

But although there can be no other acceptor after a general acceptance by the drawee, it is ſaid that when a bill has been accepted *ſuprâ proteſt* for the honour of one party, it may by another individual be accepted *ſuprâ proteſt* for the honour of another. Beawes, pl. 42.

DOE.

1810.

DOE ex. d. JONES & Ux. v. CROUCH.

Thursday, June 7th.

EJECTMENT to recover poſſeſſion of a houſe and orchard at *Enfield*, let by the leſſors of the plaintiff to the defendant for ſeven years, from Michaelmas 1809. The indenture of leaſe contained a covenant on the part of the defendant, to deliver up the premiſes at the end of the term in good repair, "and "all the trees which are now ſtanding in the orchard "of the ſaid premiſes, whole and undefaced, *reaſon-* "*able uſe and wear only excepted.*" And there was a proviſo for re-entry on a breach of any of the covenants in the leaſe.

A covenant in a leaſe, to deliver up at the end of the term all the trees ſtanding in an orchard at the time of the demiſe, "*reaſon-* "*able uſe and* "*wear only ex-* "*cepted*," is not broken by removing trees decayed and paſt bearing, from a part of the orchard which was too crowded.

It appeared that the defendant had cut down nine trees in different parts of the orchard, but that theſe were decayed, and paſt bearing; that an equal number of young thriving trees were planted by the defendant in another part of the ground demiſed; that the orchard was greatly too crowded with trees; and that from what the defendant had done, the leſſors of the plaintiff were likely to get back the premiſes at the end of the term in better condition, with reſpect to trees, than at the granting of the leaſe.

Garrow contended, that by the terms of the covenant, the defendant was prevented from cutting down a tree for any reaſon whatſoever, and that as he had rendered it impoſſible for him to deliver up the identical trees demiſed, the leaſe was forfeited.

Lord

1810.

Doe ex. d. Jones & Ux. v. Crouch.

Lord Ellenborough.—The covenant contains an exception of *reaſonable uſe and wear*. If the trees in an orchard are too crowded, muſt not the removal of ſuch as are paſt bearing, be conſidered the reaſonable uſe of the orchard and the trees? There is no pretence for the ejectment.

Nonſuit.

Garrow and *Andrews* for the leſſors of the plaintiff.

Park and *Richardſon* for the defendant.

[Attornies *Maynott* and *Wild*.]

1810.

Friday, June 8.

Helmsley v. Loader.

In an action by the indorſee againſt the acceptor of a bill of exchange, the declaration ſtated, that the payee indorſed it *his own proper hand being thereunto ſubſcribed*. It appeared that the payee's name upon the back of the bill was written, under his authority, by his wife. *Semble*, that this is no variance; and at any rate the defendant is not at liberty to object that the indorſement is not in the handwriting of the payee himſelf, after a promiſe, with a knowledge of this circumſtance, to pay the bill.

Action by the indorſee againſt the acceptor of a bill of exchange.

The declaration ſtated, that the bill was drawn by one *Force*, payable to his own order, and that he indorſed it to the plaintiff, "*his own proper hand being thereunto ſubſcribed*."

It appeared that *Force*'s name on the back of the bill was in the hand-writing of *his wife*; but that the defendant when acquainted with this circumſtance, promiſed the plaintiff to pay the bill.

Lord

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HELMSLEY v. LOADER.

Lord ELLENBOROUGH ſaid, he thought it would be too narrow a conſtruction of the words *own hand*, to require that the name ſhould be written by the party himſelf; and his lordſhip was inclined to think it would be enough to ſhew the name written by an authorized agent, but that at any rate the defendant could not be allowed to take the objection, after a promiſe to pay, made with a knowledge of all the facts.

Verdict for the plaintiff.

Park and *Puller* for the plaintiff.

Eſpinaſſe for the defendant.

[Attornies *Vincent* and *Davis*.]

But if the declaration ſtate that the party indorſed the bill "*his own proper hand being thereunto ſubſcribed*," and the indorſement was in fact made by an agent *per procuration*, this is a fatal variance. Levy v. Wilſon, 5 Eſp. 180. It ſeems extremely improper to introduce this averment, as it is quite unneceſſary, and may hurt but cannot help. A general allegation that the party made, accepted, or indorſed a bill of exchange *according to the uſage and cuſtom of merchants*, is ſupported by evidence of the act being done—immediately by the party himſelf,—or by an agent in his name,—or by procuration in the name of the agent. Elliot v. Cooper, 2 Lord Raym, 1376. Ereſkine v. Murray, Ib. 1542. Heys v. Heſeltine, *poſt*.

WILSON

Wednesday, June 13.

WILSON v. MILNER.

A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party: an action of trover is afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages are recovered; and these, together with the costs, are paid by the bailiff.—Held that there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain *money had and received*, to recover back the levy money paid over.

INDEBITATUS assumpsit for money paid, and money had and received.

On the 20th of February 1809, the defendant sued out a *fi. fa.* into Middlesex, upon a judgment against one *I. George*;—and the warrant to levy 155*l.* besides poundage, was directed to the plaintiff, a bound bailiff of the Sheriff of Middlesex. The plaintiff made his levy, and on the 22d of February paid over the 155*l.* to the defendant. On the 1st of March, a commission of bankrupt was sued out against *George*, and it was found that he had committed an act of bankruptcy on the 19th of February. His assignees immediately brought an action of trover against the Sheriff, and both the parties to the present suit, and recovered 152*l.* 18*s.* 6*d.* damages, together with costs, making up the sum of 216*l.*, the whole of which was paid by the bailiff to the assignees.

It was contended on the one hand, that the plaintiff was entitled to be completely indemnified by the defendant; and on the other that an action could not be maintained by the bailiff, to recover back even the 155*l.* which if it could not be retained by the defendant, was money had and recovered to the use of the Sheriff.

Lord ELLENBOROUGH. I think the plaintiff cannot recover on the count for money paid. Among joint tort-feazors

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WILSON v. MANSA.

feazors there is neither contribution, nor implied promiſe of indemnity (*a*). But the 155*l.* being paid to the defendant under a miſtake reſpecting *George's* bankruptcy, I think it may be recovered as money had and received to the uſe of the plaintiff, who was anſwerable for it to the aſſignees.

Verdict accordingly.

Garrow and *Marryat* for the plaintiffs.

Park for the defendant.

[Attornies, *Smith* and *Walker*.]

(*a*) Merryweather v. Nixon, 8 T. R. 186. Farebrother v. Anſley, 1 Camp. 343.

LLOYD v. ROBERR.

Wedneſday, June 13.

THIS was an action on ſtat. 4 Geo. 2. c. 28. for double the yearly value of certain premiſes of the plaintiff held over by the defendant after a notice to quit.

Debt for double value on 4 Geo. 2. c. 28, does not lie againſt a weekly tenant.

It appeared that the defendant was a *weekly tenant*, and that he continued in poſſeſſion ſeveral weeks after the expiration of a notice to quit and demand made.

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LLOYD v. ROSSEE.

Lord ELLENBOROUGH. I am ſtrongly inclined to think that this caſe does not come within the ſtatute, which ſpeaks of "tenants for life, lives or years." I am aware that a tenant for half a year, or a ſmaller portion of a year, may for ſome purpoſes be conſidered and denominated *a tenant for years* (*a*). But this is a penal ſtatute, and is to be conſtrued ſtrictly. A *tenant from week to week* I therefore cannot include in the deſcription of "tenants for life, lives, or years;" and I do not remember any inſtance of a tenant for a leſs time than a year being held within this act of parliament.

The ſingle rent had been paid into court, under a count for uſe and occupation; but as there was ſome irregularity in the manner of doing this, the plaintiff had a verdict, with nominal damages.

Garrow and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Drew* and *Settree*.]

(*a*) Litt. § 67.

REX

REX v. INHABITANTS OF SURREY.

Thurſday, June 14.

THIS was indictment againſt the county of Surrey for not repairing a bridge. Plea, that *the ſaid bridge* had been immemorially, and ſtill ought to be, repaired by the inhabitants of the pariſh of *Frimley*.

A particular pariſh was bound by preſcription to repair an old wooden foot-bridge, uſed by carriages only in times of flood. About 40 years ago the truſtees of the turnpike road built on the ſame ſite, a much wider bridge of brick, which has been conſtantly uſed ever ſince by all carriages paſſing that way. —Held that to an indictment againſt the county for not repairing this bridge, a plea that the pariſh had immemorially repaired and ſtill ought to repair the *ſaid bridge*, was not ſupported by evidence of the above facts; and that the burthen of repairing the new bridge muſt be borne by the county at large.

It appeared that there anciently ſtood a ſmall wooden bridge in the place in queſtion; this was chiefly uſed by perſons on foot; carts and waggons paſſed over it in times of flood; but on other occaſions they generally went through a ford alongſide; it was not of ſufficient ſtrength to bear a waggon loaded as waggons now are, but was ſufficiently ſtrong to bear the loaded waggons that travelled in that part of the country, where the roads were bad, while it ſtood. This old bridge had been repaired by the pariſh of *Frimley*. About forty years ago it was accidentally deſtroyed, and on the ſame ſite there was built by the truſtees of the adjoining high road, a new brick bridge twice the breadth of the former, over which all carriages travelling this road have paſſed at all ſeaſons of the year ever ſince. The new bridge has never been repaired by the inhabitants of *Frimley*, but excluſively by the truſtees of the high road.

Lord ELLENBOROUGH. How do you make out that

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the parish of *Frimley*, has immemorially repaired the *said bridge* mentioned in the indictment.

Marryat, for the county, contended that the bridge now standing having been substituted for the ancient one, they must in contemplation of law be considered the same. Although a bridge be taken down and rebuilt, its identity is not destroyed; and in all pleadings of this sort, it is averred, that a particular parish or the owners of a particular estate, have immemorially repaired the bridge in dispute, whatever changes may have taken place in its structure. In this case, there had been an ancient carriage bridge repaired by the parish. Therefore according to *Rex* v. *Inhabitants of Cumberland*, 6 T. R. 194, the parish was bound to widen it as the exigencies of the public required. The new bridge had been built and repaired by the trustees of the turnpike road; but they must be considered in this, merely the agents of the parish, from whom they had received the sum of £10.

Lord ELLENBOROUGH. I am clearly of opinion that the plea in this case is not substantiated. Not only is the new bridge different in its structure and materials from that repaired by the parish, but it is applied to very different uses. The ancient bridge was chiefly a foot bridge, and carriages do not seem to have passed over it, except in times of flood. The present bridge is crossed by every carriage travelling along the road, and the ford is entirely disused. I therefore do not think that the bridges are in any sense the same. The case of *Rex* v. *Inhabitants of Cumberland*, was carried by writ of

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of error to the Houſe of Lords, and ſome doubts were entertained upon the doctrine of the Court of K. B.; but it was thought that the point was not properly raiſed by the record. Here, however, there cannot properly be ſaid to have been an ancient carriage bridge repaired by the pariſh, and the caſe comes much nearer *Rex* v. *Weſt Riding of Yorkſhire* (*a*); where to an indictment for not repairing a bridge, the plea alledged that certain *townſhips* had immemorially uſed to repair the ſaid bridge, and it appearing that the townſhips had enlarged the bridge to a *carriage bridge*, which they had before been bound to repair as a *foot bridge*, the Court held that the plea was not ſupported. The general principle is eſtabliſhed by a great variety of caſes, that if a bridge be built by an individual, or townſhip, or pariſh, which they were not bound to build or keep in repair, but which is uſed by the public and is found a public benefit, the burthen of repairing it falls upon the county at large. The pariſh of *Frimley* was not compellable to build or keep in repair a brick bridge for the convenient paſſage of carriages at all ſeaſons of the year; and the county muſt repair the new bridge, which has been uſed beneficially as a carriage bridge, by whomſoever it may have been erected.

Verdict againſt the county.

The *Attorney General* and *Lawes* for the proſecution.

Marryat and *Nolan* contra.

[Attornies, *Dyne* and *Alcock*.]

(*a*) 2 Eaſt 353, *n*.

ADJOURNED SITTINGS IN LONDON.

1810.

Tuesday June 19th.

ROSCOW *v.* HARDY.

If a bill of exchange is presented for acceptance and not accepted, the drawer and indorsers are discharged by want of due notice of its being thus dishonoured; although the holder presents it for payment when due, and then gives them notice of its being dishonoured both for non-acceptance and non-payment.

THIS was an action against the defendant as indorser of a bill of exchange for 50*l.*, dated January 4th 1810, drawn by *James and Peter Walmsley* of *Manchester*, upon *Shaw and Edwards* in *London*, payable three months after date, to the order of *Ralph Kirk*.

Kirk having indorsed to the defendant, and the defendant to the plaintiff, the bill passed through various other hands, there being above twelve indorsements upon it. On the 23d of January it was in the possession of the *Warrington Bank*, who presented it for acceptance on that day. It was then dishonoured for non-acceptance; but the holders kept it in their hands, without giving any notice of this dishonour till the 7th of April, when the bill being due, they presented it to the drawees for payment, and payment was refused. The bill was immediately returned to the plaintiff, who took it up. In the usual time after the bill had become due, a letter from the holders was communicated to the defendant, stating that the bill had been dishonoured for non-acceptance and non-payment.

Park for the defendant contended, that the plaintiff had paid in his own wrong; and that the defendant was discharged, having had no sufficient notice of the dishonour of the bill for non-acceptance.

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Topping, contra, argued that if a bill was presented for payment after being refused acceptance, notice of the dishonour for non-acceptance was unnecessary, or might be given at the same time with the notice of the dishonour for non-payment. There being no necessity for presenting a bill payable after date for acceptance, no injury could be sustained by the drawer or indorser from the want of notice; and if this objection were to hold, it would greatly impede the circulation of bills of exchange; for by looking at a bill which is unaccepted, it is impossible to say whether it may not have been presented for acceptance, and the drawer and indorsers be discharged by the laches of a former holder.

Lord ELLENBOROUGH.—I consider it to be part of the usage and custom of merchants, for the holder of a bill which is refused acceptance, to give immediate notice of its dishonour to the drawer and indorsers. If the bill be payable at a certain time after date, there is no occasion to present it for acceptance at all; but if it be presented, and dishonoured for non-acceptance, notice becomes requisite in the same manner as upon a dishonour for non-payment. Nor is the omission cured by the bill being presented for payment, and the subsequent notice given to the defendant. The information that the bill had been refused acceptance,

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could then be of no use to him; and if entitled to this at all, he was entitled to it in a reasonable time after the circumstance actually happened.

Plaintiff nonsuited.

In the ensuing term, *Topping* moved to set aside the nonsuit, particularly on the ground that the plaintiff was ignorant of the first dishonour of the bill when he paid it.—But the Court clearly thought, that the previous indorsers were entitled to regular notice of that dishonour, and that if they were once discharged, their responsibility could not be revived by shifting the bill into other hands (*a*).

Rule refused.

Topping and *Clarke* for the plaintiff.

Park and *Littledale* for the defendant.

[Attornies, *Windle* and *Cooper*.]

(*a*) 12 East 434.

BATEMAN

1810.

Wednesday June 20th.

BATEMAN *v.* JOSEPH.

The holder of a bill of exchange is excuſed for not giving regular notice of its being diſhonoured to an indorſer, of whoſe place of reſidence he is ignorant, if he uſe reaſonable diligence to diſcover where the indorſer may be found.

THIS was an action on a bill of exchange, drawn and indorſed as follows:

"Liverpool, 24th June, 1809.

"Three months after date, pay to Abraham Joſeph 100*l.* value received.

"I. Dance.

"To R. Perry, London.

(Indorſed) "*Abraham Joſeph.*
"T. Parry.
"L. Satterthwaite.
"*S. Bateman.*
"R. Jones."

When the bill became due on the 27th of September, it was in the hands of an indorſee in *London*, who on the 28th ſent off a letter by the poſt, giving notice of its diſhonour to *Jones* at *Mancheſter*. This, *Jones* received on the 30th, and the ſame day communicated to *Bateman*, the plaintiff, before the poſt for Liverpool went off. *Joſeph* the defendant reſides in Liverpool; but that fact was not then known to the plaintiff. The plaintiff went to the counting houſe of *Satterthwaite*, his immediate indorſer, in *Mancheſter*, to make inquiries upon the ſubject, but could gain no information. *Satterthwaite* himſelf was then from home, but returned to *Mancheſter* late in the evening of the 3d of October, and ſtated that the defendant

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resided at *Liverpool*. The next morning, the plaintiff wrote a letter to him there, giving him notice of the dishonour of the bill.

Garrow for the defendant contended, that he was discharged by want of due notice of the the bill being dishonoured. When the plaintiff originally took the bill from *Satterthwaite*, he was bound to inquire into the residence of all the prior indorsers, if he meant to rely upon their credit; and it would have the worst consequences if an indorser could be called upon at any distance of time by a person saying he was unacquainted with his place of abode. On the first three days of October, the defendant might have had an opportunity of recovering the amount of the bill from the drawer or acceptor, which was gone before the notice actually arrived. The plaintiff had not used due diligence to obtain the information he pretended to want. Why had he not applied to the drawer or acceptor, whose residences were blazoned on the face of the bill? There was no evidence even of any inquiry being made of bankers at *Manchester*, from any of whom the desired information might have been expected. At any rate the plaintiff's ignorance could not prolong the responsibility of the defendant.

Lord ELLENBOROUGH.—When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonour of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself

ſelf to remain in a ſtate of paſſive and contented ignorance; but if he uſes reaſonable diligence to diſcover the reſidence of the indorſer, I conceive that notice given as ſoon as this is diſcovered, is due notice of the diſhonour of the bill, within the uſage and cuſtom of merchants. The preſent is a queſtion of fact, and the jury will ſay, Whether the plaintiff between the 30th of September and the 3d of October, uſed reaſonable diligence to aſcertain the reſidence of the defendant?—His lordſhip was rather inclined to think that there had been *laches* in not making further inquiries.—But—

The jury found for the plaintiff.

In the enſuing term, *Garrow* moved to ſet aſide the verdict, on account of the ſuppoſed *laches* of the plaintiff, in not giving earlier notice of the diſhonour of the bill.

But the Court were all of opinion that the queſtion had been properly left to the jury, and refuſed a rule to ſhew cauſe (*a*).

Park and *Richardſon* for the plaintiff.

Garrow for the defendant.

[Attornies, *Willis* and *Palmer*, and *Tomlinſon*.]

(*a*) 12 East 433.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term,

50 GEORGE III.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

1810

LOTAN *v.* CROSS.

If the owner of a chattel, gratuitously permit another perſon to uſe it, the owner may maintain *treſpaſs* for an injury done to it, while it is ſo uſed.

TRESPASS for running againſt the plaintiff's chaiſe.

It appeared that the plaintiff, a ſtable-keeper, was owner of the chaiſe; but that when the injury was done, it was in the poſſeſſion of one *Brown*, a friend of his, whom he had permitted to uſe it.

The objection being taken, that treſpaſs could not be maintained by the plaintiff under theſe circumſtances,

Lord

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Lord ELLENBOROUGH said, the property is proved to be in the plaintiff, and *primâ facie*, the thing is to be considered in his legal possession, whoever may be the actual occupier. Shew a letting for a certain time to *Brown*, and the possession would be in him; but a mere gratuitous permission to a third person to use a chattel, does not in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used (*a*).

The witnesses stated, that the defendant seemed to have no intention of running his carriage against the plaintiff's chaise; and that the accident appeared to arise entirely from the negligent manner in which the defendant was driving.

If an injury is received from the immediate, though unintentional, act of another, the remedy is trespass, and not case; and the Court of K.B. will not permit this doctrine to be questioned on a motion for a new trial.

Park thereupon objected that the action should have been case and not trespass.

Lord ELLENBOROUGH.—The injury to the plaintiff being immediate from the act done by the defendant, it was settled in Leame *v.* Bray (*b*), that trespass is the proper remedy, and that the defendant's intentions were immaterial.

Verdict for the plaintiff.

(*a*) *Vide* Smith *v.* Milles, 1 T. R. 480. Ward *v.* Macauley, 4 T. R. 489. Gordon *v.* Harper, 7 T. R. 9.

(*b*) 3 East, 393.

Park,

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Park, in the enſuing term, moved for a new trial, on the ground that the action was miſconceived, and ſtated, that *Leame* v. *Bray* had been over-ruled by the Court of C. P. in *Huggett* v. *Montgomery*, 2 N. Rep. 446.

CUR. If we are deſired to review the caſe of *Leame* v. *Bray*, the matter ſhould be brought before us in a different ſhape, than a motion for a new trial. We do not entertain ſo ſlight an opinion of our own judgment, as to allow it to be thus canvaſſed. We will wait for ſome caſe where the queſtion is raiſed upon the record, and may be carried farther.

Rule refuſed.

Vide Covell v. Laming, 1 Camp. 497. Rogers v. Imbleton, 2 N. R. 117.

Friday, July 27.

OSGOOD v. GRONING.

Freight cannot be recovered on a charter-party, unleſs the ſtipulated voyage has been actually performed: and there is no implied promiſe to pay a *compenſation* for carrying goods a part of the voyage, unleſs they are voluntarily accepted at a place ſhort of the port of deſtination.

In this caſe two iſſues were directed by the Lord Chancellor, to try, 1ſt, "Whether the plaintiff was entitled to any, and what ſum of money for *freight* on the cargo of the ſhip Neptune, depoſited in the Weſt India and London Docks?" and, 2dly, "Whether the plaintiff was entitled to any, and what

ſum

ſum, by way of *compenſation*, for the carriage of the goods in the ſaid ſhip, from Charleſtown to the port of London?"

By a charter-party dated 2d July 1807, the owner of the American ſhip *Neptune*, of which the plaintiff was maſter, let her to freight to the defendant for a voyage from *Sandy Hook* to *Charleſtown* to take in a cargo, and from thence to *Tonningen*, *Amſterdam* or *Rotterdam*. The owner covenanted that after the ſhip ſhould be completely loaded, ſhe ſhould ſet ſail from *Charleſtown*, and (the dangers of the ſeas and the reſtraints of rulers and princes excepted) proceed for *Tonningen*, *Amſterdam* or *Rotterdam*, and there deliver the cargo to the freighter or his agents; and it was further ſtipulated that if advice ſhould be received at *Charleſtown*, previous to the ſailing of the ſhip from that place, that the blockade had been taken off the river *Elbe*, the freighter ſhould be at liberty to ſend her to *Hamburgh* direct, in lieu of the other ports.

In Auguſt 1807, the *Neptune* arrived at *Charleſtown*, and there took in a cargo of ſugar and rice, the property of the defendant, conſigned by the bills of lading to *Meſſrs. R. Groning and Co. of Hamburgh*, to be delivered to them at *Tonningen* (or in caſe the blockade of the river Elbe was taken off, to proceed on to *Hamburgh* direct), on payment of freight, purſuant to the charter-party.

The plaintiff's ſhip was proceeding up channel on

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on her way to *Hamburgh*, when the plaintiff was informed of the two orders in council of His Britannic Majeſty, iſſued in Nov. 1807, whereby it was ordered that every veſſel, trading from or to the ports and places of any country at war with his ſaid Majeſty, and all other ports or places in Europe from which, although not at war with his ſaid Majeſty, the Britiſh flag was excluded, ſhould, together with all goods and merchandiſes on board, be captured and condemned as prize; but that all veſſels which ſhould arrive at any port of the United Kingdom, in conſequence of having received information of this regulation, ſubſequent to taking their cargoes on board, ſhould be permitted to proceed upon their voyage to their original ports of deſtination, if not previouſly unlawful.

The plaintiff in conſequence, brought his ſhip to *Sheerneſs*, and himſelf came up to London, for the purpoſe of conſulting the defendant's agents here. They in a ſhort time procured him a licence from his Majeſty, for the *Neptune* and her cargo to proceed from *Sheerneſs* to the port of *Rotterdam*, or any port in the north ſea, and preſſed him to proceed to *Rotterdam* accordingly. But he found that by a decree of the French Emperor NAPOLEON, dated 13th Nov. 1807, the ſhip and cargo would have been liable to confiſcation, or her arrival at *Rotterdam*, or if examined on the way thither by any French cruizer, for having touched at an Engliſh port. He therefore refuſed to proceed on the voyage, but offered to deliver up the cargo to the defendant's

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agents here, on being paid the freight and charges due upon it. They refuſed to receive it, and inſiſted that he was bound to complete the voyage, according to the terms of the charter-party. He maintained on the other hand, that he was not compellable to expoſe his ſhip to the danger of confiſcation. He therefore brought the ſhip into the port of London, and landed the rice at the London docks, and the ſugar at the Weſt India docks. He afterwards again tendered the cargo to the defendant's agents, on being paid the freight and charges. They refuſed to pay him any thing; and as they apprehended he was going to ſell the cargo to ſatisfy himſelf, they filed a bill in the defendant's name, praying that he might be injoined from doing ſo, and that he might be decreed to deliver up the cargo to them, without prejudice to any claim of the defendant againſt him, for a breach of the charter-party and bills of lading. The plaintiff in his anſwer ſet up the lien he had upon the cargo for freight and charges. The injunction was granted; but the Lord Chancellor ordered theſe iſſues to be tried, before making his final decree. In the mean time, the goods were by conſent delivered to the defendant's agents, without prejudice to the reſpective rights of the parties.

Scarlett for the plaintiff argued, that as the voyage had become impoſſible, the plaintiff was entitled to the full freight for the goods, if they were accepted here; and that at any rate, he was entitled to ſome compenſation for bringing them from America to Great Britain, which it could not be denied was beneficial to the freighters.

The

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The *Attorney General*, on the other ſide, obſerved that poſſeſſion of the goods had not been claimed here, till after they had been landed by the captain, and that they could not be conſidered as accepted by the conſignee, as they had been taken poſſeſſion of without prejudice.

Lord ELLENBOROUGH.—It is clear that in this caſe the plaintiff can have no claim for *freight*. Freight could only be earned by performing the terms of the charter-party.—Then, is he entitled to any ſum by way of *compenſation*, for the carriage of the goods from *Charleſton* to the port of *London?* His right to compenſation muſt ariſe out of ſome contract expreſs or implied. There is no expreſs contract ſet up; and from what can we imply a promiſe to pay for the carriage of the goods to England? They are brought here inſtead of being conveyed to their port of deſtination, and an application being made to the Lord Chancellor to prevent their being tortiouſly diſpoſed of by the captain, they are taken poſſeſſion of on behalf of the conſignee, without prejudice to the rights of the parties. This is no acceptance of the goods ſhort of the port of deſtination, and no foundation for a promiſe to pay *pro ratâ itineris*. I am therefore of opinion, that both iſſues muſt be found for the defendant.

Verdict accordingly.

An application was afterwards made to the Lord Chancellor for a new trial; but his lordſhip fully approved of the direction given to the jury, and thought that

that the iſſues had been properly found. He directed, however, that an action ſhould be brought by the plaintiff againſt the defendant for freight, &c., and that if it ſhould appear, that the plaintiff could not have been reaſonably required to proceed on the voyage, the defendant ſhould admit that he had *accepted* the goods in the port of London.

This action was tried at the Guildhall ſittings after laſt Michaelmas Term; when the jury being of opinion that the plaintiff might have been reaſonably required to proceed on the voyage, found a verdict for the defendant.

Scarlett, *Gaſelee*, and *Littledale*, for the plaintiff.

The *Attorney General*, *Garrow*, *Park*, and *Richardſon* for the defendant.

[Attornies, *Sermon*, and *Kaye & Freſhfield*.]

Vide Luke v. Lyde, 2 Burr. 437. Hunter v. Prinſep, 10 East, 882. Cook v. Jennings, 7 T.R. 378. Liddard v. Lopes, 10 East, 381. Smith v. Wilſon, 8 East, 526.

1810.

Monday July 30th.

PORTER and others, *v.* PALSGRAVE.

When goods are sold to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time the bill if given would have become due.

THIS was an action for not accepting a bill of exchange for the price of goods sold by the plaintiffs to the defendant, under the following contract:

"Bought for Mr. Theodore Palsgrave of Messrs. William Porter and Co., 30 casks of St. Petersburgh ashes, at 60*l. per* cwt.

"To be settled for by bill, at six months date, allowing 14 days for receiving and delivery.

"Draught and tare as customary.

"London 21st November, 1809."

It was clearly proved, that the defendant had been guilty of a breach of the contract stated in the declaration; and the only question was, whether the plaintiff was entitled to interest? A bill dated 5th December 1809, for 468*l.* 2*s.* 6*d.* the price of the goods, at six months after date, was drawn by the plaintiff upon the defendant, and refused acceptance.

The counsel for the plaintiff contended, on the authority of *Becher* v. *Jones*, *ante* 428, that he was entitled to interest from the 9th of June 1810, the day the bill, if accepted, would have become due.

On the other side, it was argued, that *Becher* v. *Jones* was in the Exchequer chamber, where a different rule prevails, and the case of *Gordon* v. *Swan*, *ante*

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ante 429, was relied upon, in which it was decided by the court of K. B. that intereſt ought not to be allowed in an action for goods ſold and delivered, to be paid for at a certain day.

Lord ELLENBOROUGH.—There, the purchaſer had not ſtipulated to pay by a bill of exchange, which makes all the difference. If there is merely a day named when payment is to be made in caſh, this is a proviſion that payment ſhall not be demanded earlier, and it afterwards becomes the common caſe of goods ſold and delivered. But if the agreement is to pay by bill at a given date, this amounts to a promiſe to pay intereſt upon the price of the goods from the day when the period expires for which the bill would have to run. Had the bill in this caſe been accepted, intereſt would clearly have been recoverable upon it from the 9th of June, and the defendant cannot be allowed to profit by his own wrong.

Verdict accordingly.

The *Attorney General*, *Garrow* and *Taddy*, for the plaintiff.

Park and *Richardſon*, for the defendant.

[Attornies, *Kaye & Freſhfield*, and *Gibbs*.]

Vide Marſhall v. Poole, 13 Eaſt, 98. Boyce v. Warburton, *poſt* 480.

JONES *v.* MORGAN and another.

In an action againſt the drawer or indorſer of a bill of exchange diſhonoured for non-payment after being accepted, although it be unneceſſary to ſtate the acceptance in the declaration, if it be ſtated, it muſt be proved;—but a promiſe to pay after the bill was due, is a ſufficient admiſſion of the acceptance, as well as of the hand-writing of the defendant himſelf and of the other parties to the bill.

THIS was an action on a bill of exchange, drawn by the defendants, payable to their own order, and indorſed by them to the plaintiff.

The bill was drawn upon one *T. Burt*, by whom it had been diſhonoured for non-payment, and the declaration unneceſſarily ſtated that he had *accepted* it according to the uſage and cuſtom of merchants.

No evidence could be adduced of his hand-writing; but it appeared that after the bill was due, one of the defendants ſeveral times promiſed the plaintiff to pay it.

The plaintiff's counſel contended, that there was no neceſſity to prove the acceptance, as it had been ſtated unneceſſarily, the liability of the defendants at all events attaching upon the non-payment of the bill; and at any rate, that the acceptance was admitted by the promiſes to pay, after the bill was due and in the plaintiff's hands.

Lord ELLENBOROUGH was clearly of opinion that the acceptance being ſtated in the declaration, muſt be proved; and he was inclined to think at the trial that the promiſes to pay did not amount to an admiſſion of the acceptance: he therefore directed a nonſuit. But upon a motion in the enſuing term to ſet the nonſuit aſide, his Lordſhip and the reſt of the Court thought,

upon the authority of *Lundie v. Robertſon*, 7 *Eaſt.* 231, that the promiſes to pay were a ſufficient admiſſion of the acceptance; and upon the ſame evidence, at the ſittings after Michaelmas term laſt, the plaintiff had a verdict.

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JONES v. MORGAN and Another.

Garrow and *Wylde* for the plaintiff.

Jervis for the defendant.

BELL and others *v.* BELL.

Wedneſday, Aug. 1.

Policy at and from Riga to the United Kingdom, on ſhip and freight, declared to be *in continuation* of two other policies, which were on ſhip and freight on a voyage from the United Kingdom to the ſhip's port of diſcharge in the Baltic, during her ſtay there, and from thence back to her port of diſcharge in the United Kingdom. The ſhip was ſeized and condemned at Riga before ſhe had diſcharged her outward cargo. *Held* that the firſt policy could not be applied to the outward freight.

It is ſtipulated by a policy of inſurance from Riga to the United Kingdom, "that if the ſhip ſhould not load a cargo at Riga by any act of the Ruſſian government, the aſſured were to receive a total loſs." The ſhip is ſeized and condemned by the Ruſſian government, before her outward cargo is diſcharged.—This is a total loſs within the meaning of the policy.

A policy at and from a foreign port, attaches when the ſhip has arrived there in good phyſical ſafety, although, from political cauſes, ſhe may be in great danger of condemnation.

ACTION on two policies of inſurance.

The firſt dated 16th Auguſt 1809, was declared to be "on the contingency of the Riſing Sun, Captain Loring, loading a cargo at Riga," with a ſubſequent clauſe, "that if *the ſhip ſhould not load a cargo at Riga by any* act of the Ruſſian government, the aſſured were to receive a total loſs," and the inſurance was declared to be "on ſeamen's wages, premiums of inſurance, and all charges whatever, valued at 1600*l.*"

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The ſecond policy, dated 30th Auguſt 1809, was "at and from Riga to the ſhip's port of diſcharge in the United Kingdom, on ſhip Riſing Sun, valued at 2000*l.* and on freight valued at 1200*l.*" and this policy was declared to be "in continuation of two other policies dated the 7th and 14th October 1808."

The two policies of which this was in continuation, were on the ſhip Riſing Sun, valued at 2000*l.* on freight, valued at 1200*l.* and on a cargo of ſalt—"at and from Cork and Liverpool to the ſhip's port or ports of diſcharge in the Baltic, during her ſtay there, and at and from thence to her port or ports of diſcharge in the United Kingdom," and by a memorandum thereon, "in caſe of loſs or accident on the outward voyage, a total loſs was to be paid on the freight."

The ſhip arrived at Riga the 28th May 1809. A few days previous to her arrival, an order of the Ruſſian government had been ſent to *Riga*, directing that the papers of all ſhips arriving at any port in Ruſſia ſhould be ſent to Peterſburgh to be examined before their cargoes were unloaded. The papers of the Riſing Sun were accordingly ſent there. On the 9th Auguſt the ſhip and cargo were put under ſequeſtration, and on the 4th December they were ſeized and ſold by the cuſtom-houſe at Riga, under a ſentence of condemnation for want of proper documents, *without the ſhip having diſcharged her outward cargo.*

On theſe facts *The Attorney General* contended, that the plaintiffs were clearly intitled to recover on the firſt policy

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policy on the contingency, and on the second as far as it applied to the *ship*. With respect to the *freight* insured by the second policy, it might be a more doubtful question. Taking the policy, which was "at and from Riga to the United Kingdom" by itself, he admitted that its import must be, that the freight insured was the freight of goods put on board to be carried on the homeward voyage, whereas the freight actually lost was that of goods carried on the outward voyage; but as this policy was declared to be in continuation of two former policies, which were on freight—*to the Baltic, during the ship's stay there from thence home*, he contended that this policy would take up all of that former risk to which its words could apply, and that as the ship was earning freight *at Riga*, which was lost, and *which the former policies would have covered*, and as the present policy was *on freight at Riga, in continuation of those former policies*, the freight so lost would be covered by the present policy.

Lord ELLENBOROUGH.—This policy was in continuation of the former, according to the subject matter expressed in it, and that was the freight of the homeward cargo. It cannot cover this loss.

Garrow and *Park* for the defendant contended, that there was no inception of the risk on either policy. With respect to the first, the insured were to recover if the ship *did not load* by any act of the Russian government. In order to establish a loss by the risk thus insured against, it must be shewn that the ship

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was in a condition to load a cargo, and that she was prevented from *loading it* by the act of the Russian government; but in fact, she not was suffered to *unload her outward cargo*, so that she was never in the condition in which the loss insured against could attach.

Lord ELLENBOROUGH. — It was the act of the Russian government which prevented her unloading her outward cargo, and which, *by that means*, effectually prevented her from loading her homeward cargo.

With respect to the second policy, they contended, that the ship was never in good safety at Riga, for that at the instant of her arrival her papers were sent to Petersburgh, and she was placed in a state of restraint which terminated in her total loss. The circumstance therefore which occasioned her total loss having taken place concurrently with her arrival when this policy was to attach, it must be considered as a loss not within the scope of this policy. Besides, this incipient loss took place before the termination of the insurances on the *outward* voyage; for they did not cease till the ship had moored in safety 24 hours, which in this case she cannot be said to have done, and therefore the policy on the *homeward* voyage had not begun to operate.

Lord ELLENBOROUGH.—The safety required to give a good commencement to the risk on the ship, is a physical safety from the perils ensured against, and not a freedom from political danger. I think this ship

was

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The assured on a policy at and from Riga, are in possession of a letter from their correspondent there, stating that an order for sending the papers of all ships arriving at that port to Petersburgh had produced a great sensation, intimating that the papers of the ship insured had been sent to Petersburgh accordingly, and expressing considerable apprehensions for her safety. This letter is not communicated to the underwriters; but the broker informs them of the fact of the ship's papers being sent to Petersburgh. *Held* that the policy was not vitiated on the ground of concealment by the non-communication of the letter.

was in safety at Riga, within the meaning of this insurance.

On the 29th May, the day after the ship's arrival at Riga, the consignees of the cargo there, *Messrs. Hill, Jacobi and Co.* wrote a letter to the plaintiffs, which was received by them in London the 27th July, in which they said, "that the order lately received there, to send the papers of all vessels that should arrive to Petersburgh *had produced a great sensation* on account of the detention which it would occasion of the vessels; that the *Rising Sun must share the same fate;* that her papers had been sent to Petersburgh; and that *till they heard a favourable result, they should defer unloading her or preparing a return cargo.*" This letter was not shewn to the underwriters; but the broker who effected the insurance, stated that the ship's papers were sent to Petersburgh for examination.

Garrow contended, that the non-production of this letter to the underwriters was a material concealment, inasmuch as it expressed a much greater degree of danger to the ship and cargo than the simple communication made by the broker, and a danger which in fact terminated in her total loss.

Lord ELLENBOROUGH.—The assured are only bound to communicate facts. The broker did communicate *the fact* of the ship's papers being sent to Petersburgh for examination. He was not bound to communicate the sensations and apprehensions which that fact produced at Riga.

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Verdict for the Plaintiff, excluding the freight on the ſecond policy.

In the enſuing term, a motion was made for a new trial on the part of the defendant.

The *Court* were clearly of opinion, that the contingency had happened which was mentioned in the firſt policy, and that the ſhip had been in good ſafety at Riga within the meaning of the ſecond: but they granted a rule to ſhew cauſe on the ground of the concealment.—Cauſe, however, being ſhewn in Hilary Term, the judges all agreed, that it was ſufficient for the broker to ſtate the fact of the papers of the *Riſing Sun* being ſent to Peterſburgh, and the rule for a new trial was diſcharged.

The *Attorney General* and *J. Warren* for the plaintiff,

Garrow, *Park* and *Carr* for the Defendant,

[Attornies, *Wadeſon*, and *Gregg & Co.*]

BOYCE and another, v. WARBURTON.

If goods are ſold to be paid for by a bill of exchange, in an action by the vendor againſt the purchaſer for not giving a bill accordingly, intereſt will be allowed from the time the bill, if given, would have become due, whether the defendant has, or has not, accepted the goods.

THIS was an action for not accepting a quantity of deals purchaſed by the defendant from the plaintiff, *to be paid by bill at 4 months*.

The

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BOYCE and another v. WARBURTON.

The breach of contract on the part of the defendant was clearly proved; and the only question was, whether the defendant should be allowed interest on the amount of the stipulated price from the time the bill, if given, would have become due,

Lord ELLENBOROUGH was of opinion, that interest should be allowed, and directed it to be added to the damages,

In the ensuing term, a rule was applied for to set aside the verdict on this ground, or to reduce the damages to the amount of the price of the deals; and it was argued, that if interest could be allowed where there was no promise to pay it, nor any written security, still that this was different from the case of refusing to pay for goods after accepting them, as the vendor had still the goods in his hands, and the purchaser could not be supposed to have made any profit by them. But

—The *Court* said, that in either way the vendor was deprived of the use of money to which he was entitled on a certain day; and that as interest would have been allowed had the bill been given but not paid, it would be unjust and absurd to withold interest where the purchaser had from the beginning broken every part of his contract.

Rule to shew cause refused.

The *Attorney General* and *Marryat* for the plintiff.

Garrow and *Lawes* for the defendant.

Vide Porter v. Palgrave, *ante*, 373. Marshall v. Poole, 13 East, 98.

MAC-

Thurſday, Auguſt 2.

MACKENZIE *v.* ROWE and others.

If a ſhip is chartered for a particular voyage, and put up as a general ſhip by the charterer, it is not enough to make the owners liable for the non-delivery of goods, to ſhew that they were put on board the ſhip to be carried in this voyage, unleſs it be proved that they were received on board by ſome perſon appointed or authoriſed by the owners.

ACTION for the non-delivery of fifty caſks of oats, ſhiped on board the *Trafalgar* to be carried from London to Surinam.

The facts relied upon by the plaintiff were, that the defendants were regiſtered owners of the ſhip in queſtion; that the oats had been put on board her in the port of London, for the purpoſe of being carried to Surinam, to which place ſhe was then bound; and that afterwards, the ſhip not being able to make Demarara, the captain ſold the oats exactly under the ſame circumſtances as are mentioned in *Van Omeron* v. *Dowick*, *ante* 42, where it was held that the captain had no implied authority to do ſo.

But there was no evidence that the oats had been received on board the ſhip by any perſon appointed by the defendants; and it was proved that they had chartered her for this voyage to Surinam, to a perſon of the name of *De Beur*, who had put her up as a general ſhip.

Lord ELLENBOROUGH held that the regiſtered owners of the ſhip were not, under theſe circumſtances, liable for the non-delivery of the oats, and directed a nonſuit.

The *Attorney General* and *Taddy* for the plaintiff.

Park and *Littledale* for the defendant.

Vide Pariſh *v.* Crawford, Stra. 1251. Vallejo *v.* Wheeler, Cowp. 143. Rich *v.* Coe, Cowp. 636. Frazer *v.* Marſh, *poſt*.

ROD-

RODGERS *v.* FORRESTERS.

Tuesday, July 31.

If the freighter of a ship employed to bring a cargo of wine into the port of *London*, covenant to unload her *in the usual and customary time* at her port of discharge, he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn into the bonded warehouses.

THIS was an action of covenant on a charter-party, whereby the plaintiff let to the defendant the ship *Margaret* to freight for a voyage from *London* to *Oporto* and back, to bring home a cargo of wine, and the plaintiff agreed, "that the said freighter should "be allowed the usual and customary time to unload "the said ship or vessel, at her port of discharge."

The declaration stated, that the ship arrived in the port of London, her port of discharge, on the 26th of August 1809, and that the usual and customary time to unload the said ship amounted to seven days from thence next following; by means whereof it was the duty of the said freighter to unload the said cargo of and from the said ship in such usual and customary time as aforesaid; but that he wholly omitted so to do, and kept and detained the said ship, with the said cargo on board thereof, forty-nine days over and above the said usual and customary time allowed for unloading the same within the port of London aforesaid;—whereby the plaintiff, during all that time, lost and was deprived of the use and profit of the said ship.

The *Margaret* actually entered the London Docks with her homeward cargo on the 25th of August, and was reported the following day. On the 31st of the same month, the wines were bonded by the defendant, and he was ready to have received them, if they could have been unloaded. But on account of the

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the crowded ſtate of the London Docks at this time, the ſhip could not get a birth till the 20th of October, and was not fully diſcharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much ſhorter time; but the ſuperintendant of the London Docks ſaid, he had never ſince the bonding ſyſtem was introduced, known a cargo of wines brought by a ſhip ſo large as the *Margaret* landed and delivered; ſuch cargoes had always been bonded.

The *Attorney General* contended, on the authority of *Randall* v. *Lynch*, *ante* 352., that the freighter was liable for the detention of the ſhip in the Docks beyond the time when ſhe might have been diſcharged, had the duties been immediately paid.

Lord ELLENBOROUGH.—In that caſe, a ſpecific period of forty days was fixed by the charter-party for loading and unloading the cargo. Here, the ſtipulation is, that the freighter ſhall be allowed *the uſual and cuſtomary time* to unload the ſhip in her port of diſcharge. What is the uſual and cuſtomary time for a ſhip to unload a cargo of wines in the port of London? According to the evidence,—when the ſhip gets a birth by rotation, and the wines can be diſcharged into the bonded warehouſes. The wines might have been landed ſooner, by an immediate payment of the duties; but ſince the bonding ſyſtem was introduced, this has ceaſed to be the uſual and cuſtomary mode of unloading ſuch a cargo. I am therefore of opinion, that the defendant has not broken the implied covenant, ariſing from the terms of the charter-party, to

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unload the ſhip in the uſual and cuſtomary time for that purpoſe at her port of diſcharge, and that he is entitled to a verdict.

The Jury found accordingly.

The *Atttorney General* and *Marryat* for the plaintiff.

Topping and *J. Warren* for the defendant.

Vide Burmeſter *v.* Hodgſon, *poſt.* 488.

SCHOLEY *v.* RAMSBOTTOM and others.

Saturday Auguſt 4.

If bankers pay a cancelled cheque drawn by a cuſtomer, under circumſtances which ought to have excited their ſuſpicion and induced them to make enquiries before paying it; they cannot take credit for the amount.

THE defendants are bankers, with whom the plaintiff kept caſh. This was an action to recover the balance of his account, and the only queſtion was, whether they were entitled to take credit for a ſum of 366*l.*

On Wedneſday the 20th of September 1809, the plaintiff being indebted to *Meſſrs. Miller and Co.* drew a cheque in their favour in the following form:

"London, September 20th 1809.

"Meſſrs. Ramſbottom, Newman, Ramſbottom and "Co.

"Pay Meſſrs. Miller and Co. or bearer, three hun- "dred and ſixty ſix pounds."

"£366 "Robert Scholey."

But

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But finding that the ſum was incorrect, he tore the cheque into four pieces, which he threw from him, and drew another cheque in the ſame form for 360*l.* The latter was preſented for payment, and paid by the defendants the ſame day.

On Monday the 25th of September, the firſt cheque was likewiſe preſented for payment by a perſon unknown. The four pieces into which it had been torn were then neatly paſted together upon another ſlip of paper; but the rents were quite viſible, and the face of the cheque was ſoiled and dirty. The defendants' clerk paid it, however, without making any inquiries.

Lord ELLENBOROUGH was of opinion, that under theſe circumſtances, bankers were not juſtified in paying a cheque; and the jury found a verdict for the plaintiff for 366*l.*

Garrow and *Lawes* for the plaintiff.

Park for the defendants.

Bankers cannot charge *intereſt upon intereſt*, without an expreſs contract for that purpoſe.

Dawes and others v. *Pinner*, Sittings after M. T. 1810.

Action by bankers for money, which the defendant had at different times over-drawn. In making up the account, the balance was ſtruck by the plaintiffs at ſtated times, and intereſt then charged upon the ſums found to be due —But Lord ELLENBOROUGH would only allow ſimple intereſt upon the ſums advanced.

COURT

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS IN LONDON.

ABITBOL *v.* BENEDITTO.

Tueſday, July 31.

THIS cauſe being called in its regular order on a former day,——

Counſel, although retained for the plaintiff, cannot withdraw the record till a brief is delivered.

Shepherd, ſerjeant, obſerved, that neither the plaintiff's attorney nor witneſſes were preſent; but if he was regular, according to the practice of the court, ſituated as he was, he would withdraw the record: He had been retained in the cauſe, but no brief had been delivered to him, nor had he any inſtructions.

Lens, ſerjeant, ſaid, that he was ready on the part of the defendant, who was in cuſtody; and inſiſted that under theſe circumſtances, the record could not be withdrawn, and the plaintiff muſt be nonſuited.

LAWRENCE, J. was of opinion, that without a brief being delivered, counſel had no authority to withdraw the record; and directed a nonſuit to be entered, unleſs a brief had been previouſly left at chambers.

Lens now moved, on the ground that no brief had been ſo left, that the nonſuit ſhould be abſolute, and that the defendant ſhould be diſcharged out of cuſtody.

Sir

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ABOTBOL v. BENEDITTO.

Sir JAMES MANSFIELD, C. J.—I think a counsel can only speak or act in a cause from his brief. How else is he to know any thing of the matter? He cannot be expected to carry his retainer book along with him, and that would only inform him that when the cause was tried he was to be for the plaintiff or for the defendant. If there has been a practice of allowing the record to be withdrawn under similar circumstances, it must have been in instances where no opposition was made. I have often said, I would listen to no application till briefs were delivered. And I am sure that this rule is most for the advantage both of the parties and of the profession. Let the nonsuit stand;—but you must proceed to discharge the defendant by summons in the usual way.

Friday, August 3.

BURMESTER *v.* HODGSON.

If by the bill of lading of a cargo of brandy brought into the London Docks, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee, is to discharge the ship in the usual and customary time for unloading such a cargo—which is the time within which the brandies can be unloaded in the Docks into the bonded warehouses. Therefore, the consignee is not, under these circumstances, liable to make compensation to the owner of the ship, in the nature of demurrage, for any delay occasioned by the crowded state of the London Docks, although the cargo might have been landed sooner, if the duties had been immediately paid.

INDEBITATUS assumpsit for demurrage, and for the use and hire of a ship.

The defendant was consignee of a cargo of brandy brought from *Charente* to London by the ship *Athalia*,

of

of which the plaintiff was maſter. In the bill of lading, there was no ſtipulation whatever for demurrage, or for unloading the brandy in any particular time.

The ſhip entered the London Docks on the 19th of Auguſt 1809; but as the docks were extremely crowded, and the brandies were to be bonded, ſhe was not able to begin to unload till the 11th of October, and did not diſcharge the whole of her cargo till the 19th of the ſame month, making a period of 63 days from the time ſhe entered. Suppoſing the brandies were to be bonded, the defendant was not guilty of any wilful delay; but had the duty been paid immediately, they might have been landed much ſooner. It appeared however, to be the invariable practice to bond cargoes of this ſort. Even when the cargo is bonded, if the Docks are not over crowded, 20 or 23 days are a ſufficient ſpace of time for unloading.—The plaintiff therefore inſiſted that he was entitled to a compenſation in the nature of demurrage, from the time the ſhip might have been unloaded, till ſhe was completely diſcharged.—But the caſe of *Rodgers* v. *Forreſter* (*a*) being cited.——

MANSFIELD, C. J. was of opinion that it could not be diſtinguiſhed from the preſent. Here the law could only raiſe an implied promiſe to do what was there ſtipulated for by an expreſs covenant, viz. to

(*a*) *Ante*, 483.

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discharge the ship in the *usual and customary time* for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded, in her turn, into the bonded warehouses. Such time, has not been exceeded by the defendant. If the brandies were to be bonded, they could not be unloaded sooner, and the defendant seems to have been as anxious to receive as the plaintiff was to deliver them.

Verdict for the defendant.

Shepherd and *Best*, serjeants, for the plaintiff.

Lens, serjeant, and *Marryat*, for the defendant.

Vide Randall v. Lynch, *ante* 352.

OXFORD CIRCUIT.

Summer Assizes, 50 George III.

MONMOUTH.

CORAM LAWRENCE J.

1810.

Tuesday August 14th.

EVANS *v.* EVANS.

Tenant for years cannot maintain trespass *de bonis asportatis* for timber cut down on the demised premises.

TRESPASS for breaking and entering the plaintiff's close, in the parish of *Newport*, in the county of *Monmouth*, and cutting down the trees growing therein. Second count, for taking and carrying away the plaintiff's trees, and converting them to the defendant's use.

It appeared that the trees which the defendant cut, grew in a piece of ground which the plaintiff occupied as tenant for a term of years under one *Hawkins*; but that there is no such parish as that stated in the declaration.

Wigley for the plaintiff contended that although he failed on the first count, he might proceed on the

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ſecond, as the tenant, even after the trees were cut down, had ſuch a poſſeſſion of them as to enable him to maintain treſpaſs for taking them from the demiſed premiſes.

LAWRENCE J.—The plaintiff had no property or intereſt whatſoever in the trees after they were ſevered from the freehold. They were then in the legal poſſeſſion of the reverſioner, and he alone could maintain treſpaſs for the aſportation.

Plaintiff nonſuited.

Wigley, for the plaintiff.

Dauncey, for the defendant.

Vide Berry v. Heard, Palm. 327. Cro. Car. 242. S. C. where it was decided after much conſideration, that the landlord has ſuch a poſſeſſion of timber cut down during the continuance of the leaſe as to enable him to maintain trover for it, becauſe the intereſt of the leſſee in the timber remained no longer than while it was growing on the land demiſed, and determined inſtantly upon the ſeverance.

BISSE and others, Assignees of STOKES, a Bankrupt, *v.* RANDALL.

Tuesday, August 14.

In an action by the assignees of a bankrupt, if no notice be given under 49 Geo 3. c. 131. that the validity of the commission is disputed, the petitioning creditor's debt is sufficiently proved by the deposition of the petitioning creditor himself before the commissioners.

IN this case no notice had been given under Sir *S. Romilly's* Act, stat. 49 G. 3. c. 131.; and the proceedings under the commission were produced and read in the usual way. The only evidence of the petitioning creditor's debt, was the deposition of the petitioning creditor himself before the commissioners.

Abbott objected that this was insufficient, as the petitioning creditor was not a competent witness to support the commission, and the statute only rendered the depositions of those admissible in evidence who might previously have been examined *viva voce*.

LAWRENCE, J.—If notice had been given, the plaintiffs would have been put upon strict proof of the petitioning creditor's debt, and the petitioning creditor would not have been a good witness to prove it; but I conceive the object of the act of parliament to have been, to make the depositions, by whomsoever sworn, sufficient evidence of the trading, act of bankruptcy, and petitioning creditor's debt, unless notice be given that the validity of the commission is contested.

The plaintiffs had a verdict.

Wigley and *Puller*, for the plaintiffs.

Abbott, for the defendant.

HEREFORD.

CORAM LE BLANC, J.

REX *v.* EARDISLAND.

Thurſday Auguſt 16th.

If to an Indictment for not repairing a highway againſt a pariſh conſiſting of three townſhips, viz. A B and C, there is a plea on the part of C, that each of the three townſhips has immemorially repaired its own highways ſeparately; the records of indictments againſt the pariſh generally, for not repairing highways ſituate in A and B, with general pleas of *not guilty*, and convictions thereupon, are *primâ facie* evidence to diſprove the cuſtom for each townſhip to repair ſeparately; but evidence will be admitted that theſe pleas of *not guilty* were pleaded by inhabitants of A and B without the privity of the inhabitants of C.

THIS was an indictment againſt the pariſh of *Eardiſland*, for not repairing a highway.—Plea by the townſhip of *Burton* in the ſaid pariſh, that there are three townſhips within the pariſh, viz. *Eardiſland*, *Burton*, and *Hardwicke*; that each townſhip has from time immemorial ſeparately repaired the highways within its bounds, and that the highway in queſtion is in the townſhip of *Eardiſland*.—Traverſe of the cuſtom to repair ſeparately.

On the part of the proſecution there were given in evidence ſeveral indictments againſt the pariſh of *Eardiſland*, for not repairing highways in the *townſhip of Eardiſland* and the *townſhip of Hardwicke*, to which the general plea of *not guilty* had been pleaded, and on which the pariſh had been convicted.

On the other ſide they offered to ſhew, that the inhabitants of *Burton* were not aware of theſe pleas being

pleaded

pleaded; but the Counſel for the proſecution inſiſted that theſe records were concluſive evidence of a joint obligation to repair being upon the whole pariſh. 1810. REX v. EARDISLAND.

LE BLANC, *J.*—The records *prima facie* diſprove the cuſtom alleged; but I will admit evidence that the pleas of *not guilty* were pleaded only by the Inhabitants of the townſhips of *Eardiſland* or *Hardwicke*. They would have an intereſt upon theſe occaſions to throw the burthen upon the pariſh at large, and the rights of the townſhip of *Burton* cannot be affected by what they excluſively did.

Such evidence was given in reſpect to each of the indictments put in; but the cuſtom was negatived on other grounds, and the Jury found a verdict of *Guilty*.

Peake for the proſecution.

Puller and *Clive* for the townſhip of Burton.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K.B.

At the Sittings in and after Michaelmas Term,

51 GEORGE III.

FIRST SITTINGS IN TERM AT WESTMINSTER.

1810.

Monday November 12th.

In an action on an attorney's bill, it is ſufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what ſhould appear to be due, and the maſter's allocatur thereupon.

LEE Gent. One, &c. *v.* JONES.

ACTION on an Attorney's Bill.

Park, for the plaintiff, contented himſelf with putting in an order of Mr. Juſtice GROSE, for referring the bill to be taxed by the Maſter, the defendant's undertaking to pay what ſhould appear to be due, and the maſter's allocatur thereupon for the ſum of 264l.

E. Lawes objected that this was inſufficient.

Lord

1810.

LEE Gent. One, &c. v. JONES.

Lord ELLENBOROUGH.—The *undertaking* admits the retainer, and binds the Defendant to pay the ſum which the maſter ſhould find to be due.

The plaintiff had a verdict on the above evidence.

Park and ——, for the plaintiff.

E. Lawes, for the Defendant.

[Attornies, *Lee* and *Collingwood*.]

Where it is material for the defendant to ſhew that the action was commenced earlier than it appears to have been by the Niſi Prius record, the declaration delivered by the Plaintiff is admiſſible evidence.

Harris v. *Orme*, Sittings after Eaſter Term, 49 G. III.

In an action for goods ſold and delivered, a queſtion aroſe whether the action as to part of the goods had not been commenced before the credit expired, which was not till April laſt. The record was entitled generally of Eaſter Term. To prove that the action had been commenced too ſoon, the declaration delivered by the plaintiff to the defendant in Hilary Term was offered in evidence, and held by Lord ELLENBOROUGH to be admiſſible for that purpoſe.

SITTINGS

SECOND SITTINGS IN TERM AT WESTMINSTER.

Saturday, November 17th.

NICHOLLS *v.* BOWES.

In an action against the maker of a promiſſory note expreſſed to be payable at a particular place, there is no neceſſity for proving that it was preſented there for payment.

THIS was an action brought by the plaintiff as indorſee of a promiſſory note drawn by the defendant in the following form:

"*London*, 1ſt *February* 1810.

"Two months after date, I promiſe to pay 100l. "to J. Lines, or order, at Meſſrs. Auſten, Maunde, "Auſten, and Tilſon's, Bankers, Henrietta Street, "Covent Garden, London, for value received.

"T. Bowes."

The making and indorſing of the note being proved, *Burrell*, for the defendant, inſiſted that the plaintiff was bound to ſhew that the note was preſented at the banking houſe where it was made payable. He relied chiefly upon *Ambroſe* v. *Hopwood*, 2 *Taunt.* 61, were the Court of C. P. is repreſented to have held that, if in an action againſt the acceptor of a bill of exchange, the declaration ſtates that it was accepted, payable at a banking houſe, the omiſſion to allege that it was preſented there for payment, is

is fatal on general demurrer. It follows, of course, that such presentment must be proved at the trial; and the present case is much stronger, the place where payment is to be demanded, being in the body of the instrument, and part of the original contract between the parties.

A gentleman, at the bar, who had prepared the demurrer in *Ambrose* v. *Hopwood*, stated that the action was there brought against the *drawer* of the bill, not the acceptor, and that there was no allegation in the declaration, that the bill had been presented either at the place where it was made payable, or to the acceptor personally, so that it did not appear that there had been any default upon his part, or that the liability of the drawer had ever attached.

Lord ELLENBOROUGH.—I am clearly of opinion that in an action against the maker of a promissory note, the place where the instrument is made payable is merely to be considered a memorandum where payment may be demanded, and not a part of the contract. The maker of the note is liable every where, and, as against him, the bringing of the action is a sufficient demand.

The counsel for the plaintiff said, they had a witness to prove that the note was presented at the bankers the day it became due.

Lord ELLENBOROUGH.—I am afraid to admit such evidence, lest doubts should arise as to its necessity. And in a case like this, the plaintiff is certainly entitled to

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NICHOLLS v. BOWES.

to a verdict on proving the hand-writing of the maker and indorſer of the note.

Verdict accordingly.

Nolan and *Copley*, for the plaintiff.

Burrell, for the defendant.

[Attornies, *Flexney* and *Beden*.]

Lyon v. Sundius, 1 Campb. 423. Wild v. Rennards, *ib.* 425. *n.* *Sed vide* Calloghan v. Aylett, *poſt*.

Saturday, November 17th.

KNAPP *v.* SALSBURY.

In treſpaſs for running with a cart againſt plaintiff's chaiſe, the defendant cannot give in evidence under *not guilty*, that the cart and the chaiſe were travelling on the high road in oppoſite directions, and that the colliſion between them happened from the negligence of the plaintiff, or from inevitable accident.

TRESPASS for running againſt plaintiff's poſt chaiſe, in which he was travelling along the highway, with a cart, and killing one of the horſes drawing the poſt-chaiſe, by the ſhafts of the cart. Plea, *not guilty*.

The defence relied upon was, that the chaiſe and the cart were travelling on the road in oppoſite directions, and that the colliſion between them took place through the negligence of the plaintiff, or by mere accident, and without any default on the part of the defendant.

Lord

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KNAPP v. SALISBURY.

Lord ELLENBOROUGH.—These facts ought to have been pleaded specially. The only thing to be tried under the plea of *not guilty* is, whether the defendant's cart struck the plaintiff's chaise and killed his horse. That it did is now admitted; and the intention of the defendant is immaterial. This is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so. The plea denying these acts must clearly be found against him.

Verdict for the plaintiff.

Park and *Knapp* for the plaintiff.

Jervis for the defendant.

[Attornies *Abbot* and *Adams*.]

Vide Milman v. Dolwell, *ante* 378.

FIRST

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Thurſday, November 29.

MOLONY, Eſquire, *v.* GIBBONS.

An action may be maintained upon a foreign judgment obtained by default, which ſtates that the defendant appeared by attorney,—without proving that the attorney mentioned had authority to appear, or that the defendant was living within the juriſdiction of the foreign Court.

ACTION on a judgment of the ſupreme court of the Iſland of Jamaica.

In the judgment, after the declaration, which was in aſſumpſit, there was the following entry:

"And the ſaid *J. Gibbons*, by *J. Ferrier* his attorney, comes and defends the wrong and injury when, &c. and ſays nothing in bar or preclufion of the ſaid action of the ſaid *J. Molony*, whereby the ſaid *J. Gibbons* remains therein undefended againſt the ſaid *J. Molony*: Wherefore," &c. [in the common form.]

Garrow for the defendant inſiſted, as this was a judgment by default, that the plaintiff was bound to prove, that *Ferrier* was properly conſtituted the defendant's attorney, or at any rate, that the defendant himſelf, pending the original action, was living within the juriſdiction of the ſupreme court; and he referred to *Buchanan* v. *Rucker*, 1 *Camp.* 63.

Lord

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MOLONY, Esquire, v. GIBBONS.

Lord ELLENBOROUGH.—I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege; and I must presume in the present case, that the Court saw *Ferrier* properly constituted attorney for the defendant.

Verdict for the plaintiff.

Park and *Reader* for the plaintiff.

Garrow for the defendant.

[Attornies, *Rose* and *Netherfolo.*]

Vide Sadler v. Robins, 1 Campb. 253. Hall v. Odber, 11 East. 118.

BLACKHAN *v.* DOREN.

Tuesday, December 4th.

ACTION against the defendant, as drawer of a bill of exchange for 250*l.*, dated Kingston, Jamaica, October 1, 1809, on Messrs. Hunter and Co. in London, at six months after sight.

The bill was refused acceptance.

To excuse the sending of notice of the dishonour of

If the drawer of a bill of exchange when it is presented for acceptance, has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they, without his privity, have appropriated the effects in their hands to the satisfaction of the debt; he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect under these circumstances that it would be accepted and paid.

the

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the bill to the defendant, the plaintiff called a clerk of the drawees', who ſtated, that when it was preſented they had produce in their hands belonging to him to the amount of about 1500*l.*; but that he owed them 10,000*l.* or 11,000*l.*, and that they had appropriated the effects in their hands to go in ſatisfaction of this debt.

Lord ELLENBOROUGH.—If a man draws upon a houſe with whom he has no account, he knows that the bill will not be accepted, he can ſuffer no injury from want of notice of its diſhonour, and therefore he is not entitled to ſuch notice. But the caſe is quite otherwiſe, where the drawer has a fluctuating balance in the hands of the drawee. There notice is peculiarly requiſite. Without this, how can the drawer know that credit has been refuſed to him, and that his bill has been diſhonoured? It is ſaid here, that the effects in the hands of the drawees were all appropriated to diſcharge their own debt; but that appropriation ſhould appear by writing, and the defendant ſhould be a party to it. I wiſh that notice had never been diſpenſed with, and then we ſhould not have been troubled with inveſtigating accounts between drawer and drawee. I certainly will not relax the rule ſtill farther,—which I ſhould do, if I were to hold that notice was unneceſſary in the preſent inſtance.

Plaintiff nonſuited.

Park and *Copley* for the plaintiff.

Littledale,

Littledale for the defendant.

[Attornies, *Stutt* and *Dennett*.]

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Vide Legge v. Thorpe, *ante* 310.

DOE ex. d. KNIGHT v. QUIGLEY.

Tuesday, Dec. 4.

EJECTMENT to recover poſſeſſion of a houſe in *Conway Street*.

If a man gets into poſſeſſion of a houſe to be let, without the privity of the landlord, and they afterwards enter into a negociation for a leaſe, but differ upon the terms; the landlord may maintain ejectment to recover poſſeſſion of the premiſes, without giving any notice to quit.

It appeared that *Knight* who had a leaſe of this houſe, wiſhed to underlet it; that while it remained empty, the defendant had got into poſſeſſion of it without *Knight's* privity, intending to take a leaſe of it from him; that ſome negociation afterwards took place between the parties upon the ſubject; but that they diſagreed about a valuation of the fixtures.

It was objected on the part of the defendant, that a notice to quit was neceſſary under theſe circumſtances.

Lord ELLENBOROUGH.—There is no evidence of any demiſe to the defendant, or of the relation of landlord and tenant ever having ſubſiſted between him and the leſſor of the plaintiff. If this was a tenancy of any ſort, it was a tenancy at ſufferance, and a notice to quit was unneceſſary.

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Doe ex. d. KNIGHT v. QUIGLEY.

The leſſor of the plaintiff had a verdict.

Abbott for the leſſor of the Plaintiff.

Park for the defendant.

[Attornies, *Scarth* and *Wegners*.]

Vide Right v. Bawden, 3 Eaſt, 260. Denn v. Rawlins, 10 Eaſt, 261.

Wedneſday, December 5.

REX *v.* WILLIAMS.

If a man writes a letter with intent to provoke a challenge, ſeals it up, and puts it into the poſt office in *Weſtminſter*, addreſſed to a perſon in the city of *London*, who receives it there, the writer may be indicted for this offence in the county of *Middleſex*.

THIS was an indictment for ſending a libellous letter, with intent to provoke a challenge.

The letter being ſealed up was put by the defendant into the two-penny poſt-office in *Park Street*, *Weſtminſter*, addreſſed to the proſecutor in the city of *London*, by whom it was there received.

Marryat for the defendant contended that in this caſe there was no evidence of any offence being committed in the county of *Middleſex*, and that it was quite different from the printing of a libel, which might be treated as a miſdemeanor either where it was printed, or in any of the places where it was diſperſed. This letter had been ſeen by no one in *Middleſex* but the defendant himſelf: it could lead to no breach

breach of the peace in this county, and it was criminal merely in relation to the profecutor, who received it in London.

Lord ELLENBOROUGH.—There was a ſufficient publication in Middleſex, by putting the letter into the poſt-office there, with intent that it ſhould be delivered to the profecutor elſewhere. Had it never been delivered, the defendant's offence would have been the ſame. On trials for high treaſon, intercepted letters are received in evidence as overt acts of treaſon in the county where they were written.

The defendant was convicted.

The *Attorney General* and *Richardſon* for the profecution.

Marryat and *Fitzgerald* for the defendant.

[Attornies, *Seymour* and *Robinſon*.]

Vide Ld. Preſton's Caſe, 4 St. Tr. 409. Gregg's Caſe, Foſt. 218. Rex. v. Stone, 6 T.R. 527.

Thurſday, December 6.

REX *v.* WM. BENSON.

On an indictment for perjury in an anſwer to a bill in Chancery, it is ſufficient evidence of the defendant having ſworn to the truth of the anſwer, to prove his ſignature to it, and the ſignature of the Maſter in Chancery before whom it purports to be ſworn.

THIS was an indictment for perjury in an anſwer to a bill in chancery.

The anſwer purported to be ſworn before *James Stanley* Eſquire, a maſter in Chancery. The Clerk who produced it, and proved the hand-writing of *Maſter Stanley* ſaid, he had no recollection of the oath being adminiſtered to the defendant; that the jurat was not in his hand-writing; but that unleſs on very particular occaſions, he is always preſent when anſwers are ſworn, and that he had very little doubt that he did adminiſter the oath to the defendant before *Maſter Stanley* in the preſent inſtance. The defendant's hand-writing was alſo proved; but it appeared that the anſwer is always ſigned by the perſon who is to ſwear to it before the oath is adminiſtered.

The *Attorney General* maintained, that the perſon who wrote the jurat ſhould be called, and that the proof of the oath was inſufficient. The defendant's ſignature was of no conſequence whatever, being at all events affixed before the anſwer was ſworn; and nothing remained but a preſumption ariſing from the handwriting of the *Maſter*, which could not fix the defendant in a criminal caſe.

Lord

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Lord ELLENBOROUGH.—I must give credit to the attestation of the *Master*. The oath appears to have been administered according to the regular course of office. The defendant's signature proves that he was the person who exhibited the answer, and I must take the signature of the *Master* for proof that the person who did exhibit it was regularly sworn to the truth of its contents. If evidence of this sort were not sufficient, it would be impossible to prove any judicial proceedings (*a*).

In an indictment for perjury in an answer to a bill in Chancery, the Bill was stated to have been filed by A against *B* (the now defendant) *and another*. In fact it was filed against B C and D, but the perjury was assigned on a part of the answer which was material between A and B—This held not to be a fatal variance.

The indictment stated that a bill was filed in the High Court of Chancery, by one *Tompkins*, "against the said *William Benson and another*." In fact the bill was filed against *Benson*, one *Davies*, and His Majesty's Attorney-general. *Benson* had been a dealer in malt, and had become bankrupt. At that time he owed certain duties to government. An extent was accordingly issued, under which all his property was swept away. *Tompkins*, one of his creditors, filed this bill against him, *Davies*, his assignee, and the Attorney-general, alleging that the bankrupt before his bankruptcy had lodged the title deeds of certain estates, for the purpose of preparing a mortgage, with *Tompkins*; who, therefore, had an equity against the crown as well as the other creditors. In that part of the answer on which the perjury was assigned, the defendant swore that he did not so deliver the deeds at the request of

(*a*) *Vide* Rex v. Morris, Bul. N. P. 239.

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Tompkins, or for the purpoſe of preparing a mortgage, but to convince him that he had property, and for no other purpoſe whatſoever.

The *Attorney General*, contended that the ſuit in chancery was miſdeſcribed. His Majeſty's Attorney-general was a moſt material party to it, and ought to have been named as one of the defendants.

Lord ELLENBOROUGH.—In point of fact the bill was filed againſt *Benſon and another*, although there was ſtill a third defendant. The queſtion was material, as between *Tompkins* and *Benſon*, and it would have been quite enough to have ſtated that the Bill was filed againſt the latter. I do not think it any material variance that the bill is alleged to have been filed againſt him and another. The ſtatute rendering it ſufficient to ſet out ſuch proceedings according to their ſubſtance and effect (*a*), would be entirely defeated if theſe ſubtleties were to prevail. I am of opinion that the indictment in this reſpect is well proved.

The defendant was acquitted on the merits.

Park and *Abbott*, for the defendant.

The *Attorney General* and *Dampier*, for the defendant.

[Attornies *Pearſon* and *Blake*.]

(*a*) 23 Geo. 2. c. 11. § 1.

DU BOST *v.* BERESFORD.

Thurſday, December 6.

TRESPASS for cutting and deſtroying a picture of great value, which the plaintiff had publicly exhibited; *per quod* he had not only loſt the picture, but the profits he would have derived from the exhibition.

Plea, *not guilty*.

Q. If to treſpaſs for deſtroying a picture, the defendant may plead, that it was a ſcandalous libel upon individuals, and that being publicly exhibited, he cut it to pieces by way of abating a nuiſance?

The owner of ſuch a libell picture ſo deſtroyed, is at moſt only entitled to recover the value of the paint and canvas, which formed its component parts.

It appeared that the plaintiff is an artiſt of conſiderable eminence, but that the picture in queſtion, entitled *La Belle et la Bête*, or "Beauty and the Beaſt," was a ſcandalous libel upon a gentleman of faſhion and his lady, who was the ſiſter of the defendant. It was exhibited in a houſe in Pall-Mall for money, and great crowds went daily to ſee it, till the defendant one morning cut it in pieces. Some of the witneſſes eſtimated it at ſeveral hundred pounds.

The plaintiff's counſel inſiſted on the one hand, that he was entitled to the full value of the picture, together with a compenſation for the loſs of the exhibition; while it was contended on the other, that the exhibition was a public nuiſance, which every one had a right to abate by deſtroying the picture.

Lord ELLENBOROUGH.—The only plea upon the record being the general iſſue of *not guilty*, it is unneceſſary to conſider, whether the deſtruction of this picture might or might not have been juſtified. The material queſtion is, as to the value to be ſet upon the article

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DU BOST v. BERESFORD.

article distroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord CHANCELLOR, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The Jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Verdict for the plaintiff. Damages 5*l*.

In the course of the trial, Lord ELLENBOROUGH held upon argument, that the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to shew that the figures pourtrayed were meant to represent the defendant's sister and brother-in-law.

Jekyll, *Marryat*, and *Gaselee*, for the plaintiff.

The *Attorney General*, *Park*, and *Brougham*, for the defendant.

[Attornies, *Pitcher* and *Lowndes*.]

Vide Fores v. Jones, 4 Esp. N. P. Cas. 97. in which it was held by LAWRENCE J. that an action cannot be maintained to recover the value of obscene or libellous prints sold by the Plaintiff to the Defendant.

REX

REX *v.* GARDNER.

Friday, December 7.

THIS was an action against the major-commandant of the 2d battalion of *Carmaerthen Volunteers*, for charging and receiving pay from government for a a greater number of men than had mustered in his corps within certain periods mentioned in his returns to the war-office.

The London Gazette is not evidence of the military appointments therein notified; but at the trial of an information against an officer in the army for false musters, it is sufficient to prove that he acted in the character mentioned in the information, without proving his commission from the King.

To prove that he was commandant of this corps as averred in the information, the counsel for the crown at first put in the *London Gazette*, in which his appointment was officially notified.

Scarlett for the defendant objected that this was insufficient, and that they were bound to prove the appointment, either by producing the defendant's commission signed by the King, or by shewing that notice had been given to the defendant to produce it, and then offering secondary evidence of its contents.

Lord ELLENBOROUGH.—I cannot think the Gazette is evidence for the purpose for which it is adduced; but it will be enough to prove that the defendant has acted as Major-Commandant of this corps, without adducing direct evidence of his appointment by the King.

The fact of his having acted in this capacity appeared from the returns themselves, in which he described

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ſcribed himſelf as Major-Commandant of the corps; and the caſe being fully ſubſtantiated in other reſpects, he was found guilty.

The *Attorney General*, *Park*, *Abbott* and *Richardſon* for the Crown.

Scarlett and *Adolphus* for the defendant.

[Attornies *Litchfield* and *Hodgſon*.]

Vide Rex v. Holt, 5 T. R. 436.

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

EVERETT *v.* COLLINS.

Monday, December 10.

If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter; this does not discharge the debtor, if the cheque is dishonoured; although the agent fails with a balance of his principal in his hands to a larger amount.

MONEY had and received, to recover the sum of 170*l.*

The plaintiff had employed the defendant, who is a salesman in Smithfield market, to sell some cattle for him, and on the 15th of June last his son went to receive the money. The defendant carried the young man with him to *Mingay, Nott and Co.* who acted as book-keepers and sub-agents for him and a number of other salesmen, and desired them to make out the plaintiff's account. The account shewed that the sum of 171*l.* 5*s.* 6*d.* was due to the plaintiff. *Mingay, Nott and Co.* then offered to pay the plaintiff's son in Bank of England notes, but he said a cheque would suit him better for the 170*l.* Accordingly they paid him 1*l.* 5*s.* 6*d.* in cash, and gave him a cheque for 170*l.* upon *Smith, Payne* and *Smith*, bankers in the city. The cheque was carried immediately to the bankers and dishonoured. Various other cheques of *Mingay, Nott and Co.* were dishonoured the same day, as they had greatly overdrawn their account; but they continued to pay at their counter till four o'clock, when they finally

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finally ſtopped, with a balance of the defendant's in their hands, larger than the ſum in queſtion.

Park contended, that the loſs ought to fall upon the plaintiff, as he had had an offer to be paid in Bank of England notes, and by his refuſing that offer, the defendant had loſt the 170*l.* in the hands of *Mingay, Nott and Co.* The plaintiff for his own accommodation prefers the credit of theſe perſons to ready money, and he muſt therefore ſtand to the riſk of the ſecurity he choſe to take.

Lord ELLENBOROUGH.—In the ordinary caſe, if a creditor prefers a bill of exchange accepted by a ſtranger to ready money from his debtor, he muſt abide the hazard of the ſecurity he takes. But *Mingay, Nott and Co.* are not to be conſidered in the light of third perſons, but as the defendant's ſervants. When they offered to pay by notes or *their* cheque, that was tantamount to an offer to pay by notes or *his* cheque. The cheque muſt be looked upon as his; and there is no pretence for ſaying that a debtor is diſcharged by giving a cheque which produces nothing, although payment in caſh may have been previouſly tendered.

Verdict for the plaintiff.

The *Common Serjeant* and *Gurney* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies *Willoughby* and *Edi.*]

So

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So where the defendant had contracted to pay the plaintiff for carrying a cargo of pilchards to Ancona, and the plaintiff had taken a bill for the amount from the defendant's agent there, which was afterwards dishonoured, it was held that this was no payment to discharge the defendant, though his agent at the time owed him more money than the amount of the bill. Tapley v. Martens, 8 T. R. 451. *Vide etiam* Bolton v. Richard 6 T. R. 139. 1 Esp. N. P. C. 106. and Brown v. Kewley, 2 Bos. Pul. 518.

FRAZER *v.* MARSH.

Monday, December 10.

The defendant purchased a ship taken in execution under a fi. fa. in the year 1805; but the legal title was not regularly transferred to him till 1810. In 1806 he entered into an agreement with the captain to let him the ship for three years at a certain yearly rent, and in no way interfered with the management of the ship afterwards. Held, that the defendant was not liable for stores supplied to the ship during the three years, by order of an agent of the captain.

THIS was an action for provisions and stores supplied to the ship *Prince of Wales*, in October, 1808.

In June 1805, this ship was taken in execution by the sheriff of Essex, under a fi. fa. against one *Hearne*, the registered owner, and sold to the defendant; but the legal title was not formally transferred to him till the beginning of the present year. He took possession of her after the purchase; and on the 4th of February 1806, he entered into an agreement with *Walker*, the captain, to let him the ship for three years, to be used and employed by him as he should think proper, at the rent of 100*l.* a year. The Defendant interfered no more in the management of the ship, and the provisions and stores in question were ordered by an agent of *Walker*, the captain, while he was in possession of her under the agreement.

Lord

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Lord ELLENBOROUGH was opinion, that under theſe circumſtances the action could not be maintained. The defendant was not documentary owner when the proviſions and ſtores were ſupplied; during the three years for which the ſhip was let, the relation of principal and agent did not ſubſiſt between him and the captain, and the credit muſt be taken to have been given to *Walker* only.

Plaintiff nonſuited.

In the enſuing term an application was made for a new trial; but the Court refuſed a rule to ſhew cauſe, being of opinion, that the relation of owner and maſter did not ſubſiſt between the defendant and Walker when the ſtores were ſupplied; that Walker was in no ſenſe the defendant's ſervant, and could have no authority from him to order the ſtores; and that the caſe of a ſhip being hired for a definite period, is different from the chartering her for a voyage, where the maſter is always appointed by the owner.

Park and *Richardſon* for the Plaintiff.

Scarlett for the Defendant.

[Attornies *Willis* and *Palmer*.]

The caſes upon this ſubject will be found ſomewhat contradictory. *Vide* Pariſh v. Crawford, Stra. 1251. Vallejo v. Wheeler, Cowp. 143. Rich v. Coe, Cowp. 636. James v. Jones, 3 Eſp. N. P. Cas. 27.

WILLIAMS *v.* SILLS.

Tuesday, December 11.

COVENANT for not keeping premiſes in repair.

Pleas, 1. Performance. 2. a Licence.

If the plaintiff declares upon a deed, and there is no plea of *non eſt factum*; ſtill, if at the trial he would read any part of the deed which is not upon the record, he muſt prove it by the atteſting witneſs in the uſual way.

For the purpoſe of ſhewing the words of the covenant more fully than they were ſtated in the declaration, the plaintiff's counſel put in the deed, which they contended they had a right to read without proving it by the ſubſcribing witneſs, there being no plea of *non eſt factum*.

Lord ELLENBOROUGH.—The defendant by refraining from the plea of *non eſt factum*, has only admitted ſo much of the deed as is expanded upon the record; and if the plaintiff would avail himſelf of any other part of the deed, he muſt prove it by the atteſting witneſs in the common way. I know not at preſent that the inſtrument produced was ever executed by the defendant, although it partly agrees with that which the plaintiff has declared upon.

The plaintiff had a verdict.

Park and *Read* for the plaintiff.

Gaſelee for the defendant.

[Attornies, *Rowlinſon* and *Foulkes*.]

Vide Hodgkinſon *v.* Marſden, *ante* 121.

Tuesday, December 11.

Roe ex d. Goatly v. Paine.

In an indenture of lease with a clause of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; and it is further stipulated by an independent covenant, that the tenant within three months from notice being served upon him by the landlord shall repair all defects specified in the notice. The landlord after serving him with a notice, may *within the three months* bring an ejectment against him for a breach of the general covenant to repair.

EJECTMENT for a house in *Fetter Lane* on the forfeiture of a lease. The demise was laid on the 2d of October last.

By indenture bearing date 28th August 1809, *Goatly* let the premises to *Paine* for twenty-one Years, and *Paine* covenanted to keep them in repair during the term: it was likewise provided, "that it "should be lawful for *Goatly*, and his surveyor, with "workmen, twice in every year during the said term "at seasonable times to enter the said premises to "view the defects, and of all defects there found to "leave notice at the said premises for the amend-"ment thereof, and that *Paine* should, within three "months after such notice, repair all such defects of "which such notice should have been given." The indenture contained the usual clause of re-entry.

It was proved that the premises were out of repair on the day of the demise. The defence was rested upon the effect of a notice, in the following form, which had been sent by the lessor of the plaintiff to the defendant on the 10th of September preceding.

"In pursuance of a certain indenture of lease bear-"ing date 28th August 1809, made, &c. I do hereby "give notice and require you forthwith at your own "proper costs and charges, to put the premises de-"mised by the said indenture of lease, and every

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GOATLEY v. PAINE.

"part thereof into good and substantial repair, agreeable to the covenant on your part and behalf contained in the said indenture of lease."

It was contended, that the lessor of the plaintiff having given this notice, could not bring his ejectment till three months had expired.

Lord ELLENBOROUGH.—The indenture contains a general covenant to keep the premises in repair. By breach of this, the lease was forfeited, and the notice was no waiver of the forfeiture.

The lessor of the plaintiff had a verdict.

Park and ——— for the lessor of the plaintiff.

Gurney for the defendant.

[Attornies, *Jones* and *Trewhitt*.]

INGRAM *v.* LEA.

Friday, December 14.

In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may be read in evidence without a stamp.

THIS was an action against a carpet-manufacturer, for not delivering a quantity of carpeting which he had made for the plaintiff.

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It appeared that when the plaintiff went to order the carpeting he wrote down upon a ſlip of paper left with the defendant a memorandum in the following form:

" 8 Pieces, body black and crimſon, 243.
" 4 Ditto, border ditto, half yard wide.
" John Ingram.
" 29, City Road, 13th October 1808."

Park, for the defendant, objected to this paper being read, as it had no ſtamp. The contract muſt be conſidered executory, or it was void under the ſtatute of frauds, there being no memorandum in writing ſigned by the party to be charged (*a*). But if the goods were not then made, the agreement did not come within the exception of the ſtamp act with reſpect to goods, wares, and merchandizes, and could not be received in evidence without a ſtamp (*b*).

Marryat, contrà, contended that this paper was not an agreement, but a mere order. It was not ſigned by the parties; it fixed no price for the goods; and it contained no ſtipulation as to when or how they ſhould be delivered. It was merely offered to ſhew that ſuch goods were ordered by the plaintiff from the defendant, and other evidence would prove

(*a*) 29 Car. 2. c. 3. ſ. 17. Towers v. Oſborne, Stra. 506.
(*b*) Buxton v. Bedal, 3 Eaſt, 303. Waddington v. Briſtow, 2 Boſ. and Pul. 452.

that

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that the defendant accepted the order, and made the goods for the plaintiff, but that upon a rise of prices he refused to deliver them.

Lord ELLENBOROUGH was of opinion the paper was evidence without a stamp,—and

The plaintiff had a verdict.

Marryat and *Bolland* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Ludlow* and *Cannon*.]

BASSETT *v.* COLLIS.

Friday, December 14.

Roaring is not unsoundness in a horse, unless it be shewn to proceed from some disease or organic defect.

THIS was an action on the warranty of a horse.

It was proved, that the horse being put to hard work a few days after he was purchased, he turned out to *a roarer*; and a question arose, whether *roaring* constitutes *unsoundness?*

Lord ELLENBOROUGH.—It has been held by very high authority (*a*), that *roaring* is not necessarily unsoundness; and I entirely concur in that opinion. If

(*a*) Sir James Mansfield, C. J.

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the horſe emits a loud noiſe, which is offenſive to the ear, merely from a bad habit which he has contracted, or from any cauſe which does not interfere with his general health or muſcular powers, he is ſtill to be conſidered a ſound horſe. On the other hand, if the roaring proceeds from any diſeaſe or organic infirmity which renders him incapable of performing the uſual functions of a horſe, then it does conſtitute unſoundneſs. The plaintiff has not done enough in ſhewing that this horſe was a roarer. To prove a breach of the warranty, he muſt go on to ſhew that the roaring was ſymptomatic of diſeaſe.

The defendant had a verdict.

Marryat and *Campbell* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Empſon* and *Tucker*.]

Q. as to *thruſhes*, *ſplints*, and *quidding*? There have been ſeveral trials lately in which it was debated whether theſe conſtitute unſoundneſs; but the opinions of the farriers and veterinary ſurgeons examined were ſo contradictory, that it was impoſſible for the court to lay down any general rule upon the ſubject. *Vide* Garment v. Barrs, 2 Eſp. N. P. C. 673.

BAT-

BATCHELLOR and another *v.* SALMON.

Saturday, December 15.

A writ directed generally to the ſheriff of a county, may be deſcribed in pleading as directed to the individual by name, who was in fact ſheriff of the county when the writ iſſued.

THIS was an action on a written indemnity given by the defendant to the plaintiffs, under the following circumſtances:

There had been a levy upon the goods of one *Harris*, at the ſuit of one *Breakſpeare*, for whom the plaintiffs were attornies. A doubt ariſing whether *Harris* had not committed an act of bankruptcy before the execution, the ſheriff would not pay over the money levied without an indemnity. In conſideration that the plaintiffs would indemnify the ſheriff, the defendant then undertook to indemnify them. The money was accordingly paid over to *Breakſpeare*; but an action of *trover* was afterwards brought againſt the ſheriff by *Harris*'s aſſignees, and the preſent plaintiffs were obliged to pay the amount of the ſum levied, together with coſts.

The declaration ſtated, that *Breakſpeare* ſued out "a certain writ of our Lord the King, called a *fieri facias, directed to Chriſtopher Smith, Eſquire, and Sir Richard Phillips, Knight, ſheriff of Middleſex.*"

The writ produced was a fi. fa. in the common form, addreſſed to the ſheriff of *Middleſex* generally.

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Park objected that this was a variance; but Lord ELLENBOROUGH held, that as *Chriſtopher Smith* and Sir *Richard Phillips* were in reality ſheriff of Middleſex at the time, the writ might be alleged to have been directed to them by name.

An action brought to recover a particular ſum of money, may be deſcribed in pleading "as an "action for the "recovering of "the ſaid ſum "of money," although in form it was an action of *trover*.

The declaration afterwards went on to ſtate, that in Michaelmas term, in the 48th year, &c. a certain action was proſecuted at Weſtminſter, by certain perſons againſt the ſaid *Chriſtopher Smith and Sir Richard Phillips*, as ſuch ſheriff as aforeſaid, for the recovery of the ſaid ſum of money ſo paid as aforeſaid (viz. the money levied upon the goods of Harris, the bankrupt.)

The evidence was, that an action of *trover* had been brought by Harris's aſſignees for converting the goods.

Park contended that the action deſcribed in the declaration was an action for *money had and received*; and that the real action being *trover*, this was a fatal variance.

Lord ELLENBOROUGH.—An action of trover was brought "for the recovery of the ſaid ſum of money ſo paid as aforeſaid." The recovery of the money is ſtated in the declaration as the object of the action, and the means employed was an action of trover. There is here no incongruity.

The plaintiffs had a verdict.

In

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In the enſuing term *Park* moved for a new trial on account of a miſdirection on both theſe points: but the court thought there was no variance, and refuſed a rule to ſhew cauſe.

Jekyll and *Puller* for the plaintiff.

Park forthe defendants.

BARCLAY v. BAILEY.

Monday, Dec. 17.

ACTION againſt the drawer of a bill of exchange accepted by one *David Hardy*.

The preſentment of a bill of exchange for payment at the houſe of a merchant reſiding in London, at 8 o'clock in the evening of the day it becomes due, is ſufficient to charge the drawer.

At eight in the evening of the day the bill became due, it was preſented at the houſe mentioned on the face of it as the drawee's place of reſidence, when the anſwer given by a perſon who came to the door was, that Mr. *Hardy had become bankrupt, and removed into another quarter of the town.*—On the part of the defendant, it was proved that he had a perſon ſtationed at this houſe for the purpoſe of taking up the bill, from nine in the morning till four in the afternoon, but that no one preſented it during that time; and the point was ſtrenuouſly argued, that a preſentment ſo late as eight in the evening was inſufficient to charge the drawer.

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Lord ELLENBOROUGH.—I think this preſentment ſufficient. A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the preſentment had been during the hours of reſt, it would have been altogether unavailing; but eight in the evening cannot be conſidered an unſeaſonable hour for demanding payment at the houſe of a private merchant who has accepted a bill.

The plaintiff had a verdict.

Park and *Littledale* for the plaintiff.

Topping and *Williams* for the defendant.

[Attornies, *Cooper* and *Ellis*.]

If a bill is accepted payable at a banker's, it muſt be preſented there for payment within the uſual banking hours at the place where the banker reſides. Preſentment of a bill at a banker's in London after 6 o'clock in the evening, has been held to be too late, and inſufficient to charge the drawer. Parker *v.* Gordon, 7 Eaſt, 385.

BURGON *v.* SHARPE and others.

Monday, Dec. 17.

The captain of a ship has no authority as such, to agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters of the ship in England, and on which he has sailed to a foreign country.

THIS was an action for freight and demurrage, on a memorandum for a charter — in a voyage from *London* to *Bueynos Ayres* and back.

When the ship arrived in the river *Plata*, it was found that *Buenos Ayres* had been recaptured by the Spaniards, and she went to *Monte Video*. There her outward cargo was unloaded and accepted by *G. Dyson*, one of the defendants, who was upon the spot, and desired that she might wait a certain number of days for a return cargo, which finally could not be procured for her. The plaintiff contended, that *Monte Video* had, under these circumstances, been substituted for *Buenos Ayres*, and that the defendants were liable in the same manner as if the agreement had on his part been performed as it stood in the written memorandum.

Lord ELLENBOROUGH.—Who represented *Burgon* in this substitution?

The plaintiff's counsel contended, that the captain had sufficient authority for that purpose.

Lord ELLENBOROUGH.—The captain was captain for the voyage originally agreed upon, and on which the vessel sailed from *England*. Every thing out of that

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that voyage was beyond the ſcope of his authority as captain. As ſuch he had no power to change that voyage for another. The perſon who is intruſted with the command of a ſhip may be veſted with a complete controul as to her employment and deſtination; but this is ſuperinduced upon his authority as captain; and to ſhew that the captain in this caſe could do away the contract entered into by the owner and conclude a freſh contract binding on both parties, you muſt go farther than merely proving that he was captain of the ſhip.

The cauſe was afterwards referred.

Park, *Marryat* and *Richardſon* for the plaintiff.

The *Attorney General* and *Topping* for the defendant.

[Attornies, *Sudlow* and *Lamb*.]

Tueſday, Dec. 18.

HODGSON v. DAVIES.

If goods in the city of London are ſold by a broker, to be paid by a bill of exchange, the vendor has a right, within a reaſonable time, if he is not ſatisfied with the ſufficiency of the purchaſer, to annul the contract. But the vendor muſt intimate his diſſent as ſoon as he has had an opportunity to inquire into the ſolvency of the purchaſer.—Five days conſidered too long a period for this purpoſe.

THIS was an action for not delivering tobacco ſold by the defendant to the plaintiff, through the medium of a broker,—20 hogſheads of which were to be paid *by bill at two months*, and the remaining 20 *by bill at four months*, adding two months intereſt.

The

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The defence principally relied upon was, that the defendant had not ratified the contract entered into by the broker. On the 7th of July 1808, the broker having the usual authority from both parties wrote out the bought and sold note, and sent a copy to each of them. The defendant made no objection till five days after, when he was called upon to deliver the tobacco. He then said he did not approve of the sufficiency of the plaintiff, and refused to perform the contract.

The counsel for the defendant contended, that the person who sells goods by a broker, reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit of the purchaser; —and offered to prove that such is the usage of trade in the city of London.

Lord ELLENBOROUGH was at first rather inclined to think, that the contract concluded by the broker must be absolute, unless his authority was limited by writing, of which the purchaser had notice. But, —

The gentlemen of the special jury said, that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract.

Lord ELLENBOROUGH allowed that this usage was reasonable and valid. But he clearly thought that the

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rejection must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigency of commerce would permit. However, he left it to the jury to say, whether it was according to usual commercial practice, to reject a contract so long after it had been entered into.

The jury, without any hesitation, found for the plaintiff.

If it is stated generally in a bought and sold note that the goods are to be paid "*by bill*," evidence cannot be received to shew, that *by bill* is meant *an approved bill*: and *semble*, that an *approved bill* is a bill to which there is no reasonable objection, and that ought to be approved.

The plaintiff proved that he had tendered his own acceptances in payment of the tobacco.

Park at first offered to call witnesses to prove, that *by bill* is meant an *approved bill*, and that the seller is not bound to deliver the goods unless he approves of the bill offered in payment by the purchaser.

Lord ELLENBOROUGH.—I cannot receive this evidence. The contract must speak for itself. Even if the phrase *approved bill* were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which ought to be approved. To allow the seller in an arbitrary manner to repudiate the bill, would be to enable him, according to his interest or caprice, to annul a contract by which the purchaser is absolutely bound.

The *Attorney General*, *Marryatt* and *Gurney*, for the plaintiff.

Park

Park and *Abbott* for the defendant.

[Attornies, *Crowder* and *Legatt*]

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Although the power of a *broker* is thus limited, a *factor* ſeems in all caſes to be authorized to make an abſolute ſale of the goods of his principal *upon credit*. Willes 406. 3 Boſ. & Pul. 489. But a ſtock-broker can in no caſe ſell ſtock on credit, without a ſpecial authority. 1 Camp. 258.

DE GRAVES *v.* SMITH.

Wedneſday, Dec. 19.

If A inquires generally of B concerning the circumſtances of C, A cannot maintain an action againſt B. for a deceitful repreſentation upon this ſubject, if C pays A for the goods which it was in contemplation to ſell when the repreſentation was made, although C becomes inſolvent, and is indebted to A. for other goods ſubſequently ſold.—*Aliter*, if A had enquired of B whether C was worthy to be truſted as a general cuſtomer, or if there had been any conſpiracy between B and C to cheat A by paying for the firſt parcel of goods.

THIS was an action for a falſe and deceitful repreſentation of the credit and circumſtances of one *W. Rye*, whereby the plaintiff had been induced to truſt him, and had loſt a large ſum of money.

The plaintiff is a wholeſale linen-draper. The defendant and *Rye* were in partnerſhip as retail linen drapers, but had ſeparated ſhortly before the repreſentation in queſtion. On the 7th of December 1808, *Rye* wiſhed to purchaſe goods from the plaintiff to the value of 42*l.* and referred him to the defendant as to his credit. The plaintiff accordingly interrogated the defendant upon the ſubject, without mentioning the

quantity-

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quantity of goods then to be sold to *Rye*, or any particular mode of dealing to be established between them. The defendant said, "*Rye* had once in the concern, near 7000*l.*; I should still lend him 1,500*l.* on his own security; and I consider him a very honest man, and trust worthy."

The plaintiff accordingly let *Rye* have the goods, and went on dealing with him till the 12th of August 1809, having furnished him with goods during that time to the value of 347*l.* 10*s.* 5*d.* *Rye* paid for the first two parcels which he had, but at the close of the account he owed 242*l.* He then became insolvent; and it appeared that, within the defendant's knowledge, his affairs were in an embarrassed state at the time of the representation.

Park, for the defendant, contended, that under these circumstances the action could not be maintained. The loss of which the plaintiff complained had not arisen from the defendant's representation, but from the plaintiff's own negligence: for the goods furnished on the faith of the representation, the plaintiff had been regularly paid. If he was to go on dealing with *Rye*, he should have made fresh inquiries concerning his solvency. Omitting to do so, he acted upon his own opinion. A representation of this sort never could be allowed to operate as a perpetual guarantie.

Topping, contrà, relied upon *Hutchinson* v. *Bell*, 1 *Taunt.* 558, in which it was held, that if *A* make an

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an inquiry of *B* as to the circumstances of *C* with respect to opening an account with him as a general customer, and *B* fraudulently misrepresents them, in consequence of which *A* sells *C* goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference was made. HEATH J. there remarked, that if the action could be at all maintained, it would be very inconvenient to limit it to the goods first supplied; for he had seen many instances of conspiracy to defraud traedsmen, in which the goods first delivered were always punctually paid for; and MANSFIELD C. J. declared that he thought it reasonable to make the defendant answerable for the credit given to the third person on the faith of his representation, provided it was not carried to an unreasonable extent, and was confined to a reasonable time. Here the credit given by the plaintiff to *Rye* was reasonable both as to time and extent, and was a direct consequence of the representation. That being false and deceitful, the defendant ought, therefore, to make good the loss which had thereby arisen to the plaintiff.

LORD ELLENBOROUGH.—In the case in the Common Pleas, the plaintiff had stated to the defendant, that Young, the third person, was about to open an account with him as a general customer. On that ground the defendant might be liable for any loss which arose to the plaintiff from subsequent dealings, within a reasonable time. But to say that in ordinary cases of this sort, the person who gives a representation of

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of the credit of a third perſon, ſhall be liable for other parcels of goods afterwards furniſhed to him, would be to make the repreſentation a continuing guarantie, and to repeal the ſtatute of frauds. When caſes appear of a conſpiracy to cheat a tradeſman by means of paying him for one parcel of goods, they will be determined by their own peculiar circumſtances. Nothing of that kind has been proved here. The obſervations of the learned judges in *Hutchinſon* v. *Bell*, muſt be confined to the caſe then in judgment before them. The plaintiff having been paid for two parcels of goods furniſhed after the repreſentation, has failed to ſhew that he has ſuſtained any loſs by reaſon of the defendant's deceit, and muſt therefore be

Nonſuited.

Topping and *Gleed* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Foulkes* and *Tucker*.]

RICKFORD and others *v.* RIDGE.

Thurſday, December 20.

A Banker in London who receives a cheque by the general poſt, is not bound to preſent it for payment till the following day.

MONEY had and received, to recover back a ſum of 300*l.* paid by the plaintiffs to the defendant under the following circumſtances.

The plaintiffs are bankers at *Ayleſbury* in the county of *Buckingham*. At noon on the 13th day of June laſt, the defendant aſked them to caſh for him a cheque, dated on the 11th of the ſame month, drawn by *Mingay, Nott & Co.* ſaleſmen in Smithfield, on *Smith, Payne & Co.* bankers in the city of London. The plaintiffs gave him country notes for the amount, which were duly paid. The poſt leaves *Ayleſbury* at ſix in the evening. The plaintiffs did not ſend off the cheque by the poſt of the 13th, but by a coach which ſtarted at eight o'clock in the morning of the 14th. It was directed to *Praed & Co.* bankers in Fleet Street, the plaintiffs' agents in town, who received it between three and four in the afternoon of the ſame day. They preſented it for payment about 11 in the forenoon of the 15th, when the anſwer was, "No effects — muſt ſee the drawers." *Mingay, Nott & Co.* paid at their own counter till four on the 15th; but no application was made to them to pay this cheque. Notice of its diſhonour was given to the defendant on the 16th. The clerks of *Praed & Co.* ſtated, that had the cheque arrived by poſt on the forenoon of the 14th, they ſhould not have preſented it before the 15th. They ſend out cheques and bills

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for payment only once a day; and as this is generally before letters by the poſt are delivered, cheques and bills contained in ſuch letters remain with them till the following morning. Clerks from other bankers in Fleet Street, ſwore that this is according to the manner in which they carry on buſineſs in that part of the town.

A Gentleman of the ſpecial jury obſerved (and it was on both ſides allowed to be ſo) that the practice is different with all London bankers eaſt of *St. Paul's*, who preſent for payment all cheques and bills the very ſame day they receive them by the poſt.

The *Attorney General*, for the plaintiffs, inſiſted that they were not bound to ſend off this cheque to London ſooner than by the poſt of the 14th, the day after they received it. The tranſmitting of a cheque from the country, he compared to giving notice of the diſhonour of a bill of exchange. For both purpoſes the party has a day, without reference to the exact hour when he himſelf receives the cheque or the notice. But even ſuppoſing that the plaintiffs ſhould regularly have ſent the cheque by poſt on the 13th, if they meant to make uſe of that conveyance, ſtill all due diligence had been uſed with reſpect to the cheque, as it was preſented for payment as ſoon as it would otherwiſe have been by the uſage of the bankers in Fleet Street, which muſt be conſidered reaſonable and conſiſtent with the law of merchants.

Park, for the defendant, denied that the plaintiffs were at liberty to keep the cheque at *Ayleſbury* till ſix

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ſix in the evening of the 14th, when they could, without the ſlighteſt difficulty or inconvenience, have diſpatched it at the ſame hour the day before; and he contended, that if *Praed & Co.* had received the cheque by poſt on the 14th, they would have been bound to have preſented it for payment the ſame day, as much as if they lived in the heart of the city. He likewiſe objected that the cheque had not been carried to *Mingay, Nott & Co.* on the 15th, according to the anſwer given at *Smith, Pain & Co.'s*, as in that caſe it would no doubt have been paid.

Lord ELLENBOROUGH.—The holder of a cheque is not bound to give notice of its diſhonour to the drawer for the purpoſe of charging the perſon from whom he received it. He does enough if he preſents it with due diligence to the bankers on whom it is drawn, and gives due notice of its diſhonour to thoſe only againſt whom he ſeeks his remedy. The queſtion here is, whether if the cheque had arrived by poſt on the 14th, the bankers were bound to preſent it for payment the ſame day? This muſt be decided by the law-merchant. I can not hear of any arbitrary diſtinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eaſtward of St. Paul's and another for the weſtward. They may as well fix upon St. Peter's at Rome. It is always to be conſidered, whether under the circumſtances of the caſe the cheque has been preſented with reaſonable diligence. This is what the law-merchant requires. The rule that the moment a cheque is received by the poſt, it ſhould invariably

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be ſent out for payment, would be moſt inconvenient and unreaſonable. In *Liverpool*, and other great towns, different poſts arrive at different hours; but it would be impoſſible to have clerks conſtantly ready to carry out all the bills and cheques that may arrive in the courſe of the day; nor if it were poſſible, is it requiſite that all other buſineſs being laid aſide, parties ſhould devote themſelves to the preſenting of cheques. The rule to be adopted muſt be a rule of convenience; and it ſeems to me to be convenient and reaſonable that cheques received in the courſe of one day ſhould be preſented the next. Is this practice conſiſtent with the law-merchant? It cannot alter it. Bankers would be kept in a continual fever if they were obliged to ſend out a cheque the moment it is paid in. The arrangement mentioned by the plaintiffs' witneſſes appears ſubſervient to general convenience, and not contrary to the law-merchant, which merely requires cheques to be preſented with reaſonable diligence.

The jury, after ſome deliberation, found a verdict for the plaintiffs.

The *Attorney General* and *Littledale* for the plaintiffs.

Park and *Marryat* for the defendant.

[Attornies, *Roſe* and *Bower*.]

BARING *v.* VAUX.

Friday, December 11.

A warranty in a policy of inſurance againſt *capture in port* does not protect the underwriters from a loſs happening by capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. Therefore where a ſhip inſured from *Rotterdam* to *London*, and "warranted free "from capture "in port," was captured while lying at anchor near *Ghoree* in the river *Maes*, the underwriters were held liable.

THIS was an action on a policy of inſurance on the *Dorothea Margaritta* "at and from Rotterdam to London, with leave to touch, unload and receive goods at all or any ports, *warranted free from capture in port.*"

The ſhip, while lying at anchor in *Ghoree Ghat*, about half an Engliſh mile from *Ghoree*, was captured by a French privateer, which had followed her down the *Maes* from *Rotterdam*. The place where ſhe then lay is an open road, but within the head lands which are conſidered to form the mouth of the river *Maes*.

The *Attorney General*, for the plaintiff, contended, that this caſe was decided by *Brown* v. *Tierney*, 1 *Taunt.* 517, where a ſhip warranted free from capture or ſeizure in port, being captured in *Pillaw Roads*, it was held that the underwriters were liable.

Park, *contrà*, obſerved, that it did not appear that *Pillaw Roads* had any protection from the land, and that that caſe was therefore inapplicable. Here, the place where the ſhip lay was in the river *Maes*, and ſhe muſt be taken to have been *infra præſidia* at the time. A ſhip muſt be taken to be in port within the meaning of this warranty, unleſs ſhe were upon the

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open ſeas. While in a river or land-locked road, ſhe is expoſed to the riſks againſt which the underwriters wiſh to guard, and which are excepted in the policy. While the ſhip was lying off *Ghoree* ſhe might have been ſeized by the Douanniers ſtationed in that town. In fact ſhe was captured by a privateer that had watched her from *Rotterdam*. She was not in a harbour when taken; but a port and a harbour are quite diſtinct, and a port frequently includes the mouth of a river or an adjoining roadſtead.

Lord ELLENBOROUGH. — If you would protect yourſelf by the warranty, you muſt ſhew that the ſhip was in ſome port at the time of the capture. You have given no ſuch evidence. You muſt make the place where ſhe lay at anchor *a port*, and no witneſs has ſtated that it is within the port of *Rotterdam*, or the port of *Ghoree*, or any other port. The warranty not having ſpecified the port of departure, I think it is not narrowed to *Rotterdam*; but giving you the benefit of all ports, you do not prove the capture to have happened in any port whatſoever. You only ſhew the ſpot to be within the head-lands of a river; but this is greatly too looſe. The ſhip might have been captured by a privateer that followed her from *Rotterdam* when ſhe was within ſight of the Engliſh coaſt. The warranty ſeems to guard againſt land riſk. The ſhip might be ſeized by a military force while taking in her cargo; and this was the ſort of peril againſt which the underwriters would not inſure. But at any rate, they muſt find the port in which they ſay this veſſel was anchored when the loſs took place.

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The gentlemen of the ſpecial jury ſaid, they were clearly of opinion the ſhip was not to be conſidered as in port when ſhe was captured, and immediately found a verdict for the plaintiff.

In the enſuing term, an application was made to the court for a new trial; but the reſt of the court agreeing with the CHIEF JUSTICE, a rule to ſhew cauſe was refuſed.

The *Attorney General*, *Topping* and *Puller* for the plaintiff.

Park and *Taddy* for the defendant.

Vide Jarman v. Coape. *poſt.*

BELL and others v. CARSTAIRS.

Friday, December 21.

A repreſentation made to any underwriter except the firſt on the policy, is not to be conſidered as made to ſubſequent underwriters.

THIS was an action on a policy of inſurance on the ſhip Eliza, her freight and cargo, at and from Virginia to a market in Holland or Germany, with leave to touch at or off Falmouth for orders.

The ſhip was captured in the Engliſh channel by a French privateer, and afterwards condemned by the court of prizes at Paris for not having on board a paſſport in the form required by the treaty between France and the United States of America.

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The ſhip was not deſcribed or warranted in the policy to be of any particular nation; but for the purpoſe of ſhewing that the aſſured were bound by a *repreſentation* that ſhe was *American*, the defendant's counſel propoſed to prove that ſhe had been ſo repreſented to an underwriter, whoſe name ſtood before the defendant's, but was not the firſt on the policy.

Lord ELLENBOROUGH. — This evidence is inadmiſſible. It is difficult to ſee on what principle of law a repreſentation to the firſt underwriter is conſidered as made to all thoſe who afterwards underwrite the policy. That rule being eſtabliſhed, I will abide by it; but I will by no means allow it to be extended. You muſt ſhew the repreſentation to have been made to the firſt under-writer on the policy, or to the defendant himſelf. What paſſed between the broker and the intermediate underwriters, is to be conſidered merely *res inter alios acta*.

The *Attorney General*, *Park* and *I. Warren* for the plaintiffs.

Scarlett, *Puller* and *Campbell* for the defendant.

[Attornies, *Blunt* and *Wadeſon*.]

Vide Pawſon v. Watſon, Cowp. 787. Stackpool v. Simon, Park, 582. 6 ed. Marſden v. Reid, 3 Eaſt, 572.

BOUSFIELD

BOUSFIELD *v.* CRESWELL, Executor of WHITFIELD. Saturday, November 22.

THE defendant's teſtator was an inſurance broker, and had effected a policy for the plaintiff where a total loſs had happened. This was an action for his not having duly called upon certain of the underwriters, who have ſince become inſolvent, to ſettle the loſs and pay the ſums inſured by them.

If an inſurance broker keeps a policy he has effected in his hands, he is bound to uſe reaſonable diligence to procure the underwriters to ſettle and pay any loſs that may happen upon it.

It appeared that Whitfield had been employed as a broker to get the policy under-written; but there was no evidence to ſhew that he ought to have called upon the underwriters to ſettle and pay, except that the policy remained in his hands after the loſs had happened.

Lord ELLENBOROUGH.—If an inſurance broker keeps the policy in his hands, he ſhall be preſumed to promiſe, that he will collect the ſums due from the underwriters upon a loſs happening, in conſideration of the commiſſion he receives for effecting the inſurance. Here the teſtator, if he choſe to part with his lien, might have handed over the policy to the aſſured as ſoon as it was effected, and his reſponſibility would then have been at an end; but as he retained it, he was bound to uſe all reaſonable diligence to bring the underwriters to a ſettlement of the loſs, according to the uſage of trade in this reſpect.

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There was a verdict for the defendant upon the merits.

The *Attorney General*, *Marryat* and *Gaſelee* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Atcheſon* and *Williams*.]

If an inſurance broker living at a diſtance from his principal, upon a loſs happening, gives him credit in account for the money due from the underwriters, he cannot a conſiderable time after make a demand upon him for the amount of the ſums ſubſcribed by ſeveral of the underwriters who have become inſolvent without paying.

Jameſon and Another v. Swainſtone, C.P. Sittings in M.T. 1809. *Indebitatus aſſumpſit* to recover a ſum of 325*l.* from the defendant, under the following circumſtances: The plaintiffs were inſurance brokers reſiding at *Leith* in Scotland, and had, by orders of the defendant, who lived at *Liverpool*, effected for him certain policies of aſſurance with different underwriters at *Leith* upon the defendant's ſhip, bound on a voyage from *Liverpool* to the *Baltic*. In the courſe of the voyage the ſhip was ſtranded in the *Orkneys*, and the plaintiffs advanced conſiderable ſums of money in refitting the ſhip and preparing her for the remainder of the voyage. Afterwards, an average loſs was adjuſted of 68 *per cent.* and the plaintiffs, upon that adjuſtment, in the month of May 1806, tranſmitted an account from *Leith* to the defendant at *Liverpool*, debiting him with their advances, and giving him in return credit for the amount of the average loſs due from the underwriters in *Leith*. The balance of the account ſo rendered, was in favour of the plaintiffs 170*l.*, which the defendant immediately paid. In the month of Auguſt following, which was the uſual time at *Leith*, of ſettling between the brokers and the underwriters, the plaintiffs called upon the underwriters for the amount of the average loſs; ſome of them paid, others refuſed upon the ground of

of inſolvency. The ſum which was not received, amounted to 325*l.* and was the ſubject of the preſent action. Different applications were made by the plaintiffs to the underwriters for payment, but without effect. Afterwards, in Auguſt 1808, the plaintiffs tranſmitted another account to the defendant, in which they claimed to be due to themſelves this ſum of 325*l.* by reaſon of their not being able to receive it from the underwriters.

The plaintiffs' counſel contended, that as they had received no *del credere* commiſſion from the defendant to guarantee the ſolvency of the underwriters, and as they had endeavoured to collect what was due from them, they had a right to recover from the defendant that ſum for which they had before given him credit, upon the faith that the underwriters would pay it.

On the other hand it was inſiſted, that the plaintiffs having kept their principal in the dark for two years, with reſpect to the ſtate of thoſe underwriters who refuſed to ſettle the average loſs, could not now call upon him for the ſum in queſtion: and the defendant undertook to prove that the uſage of trade was againſt the demand.

MANSFIELD C. J. ſaid, that without reſorting to uſage, which might be different at *Leith* and *London*, he was of opinion, that after ſo great a lapſe of time between the rendering of the two accounts, the brokers as betwixt themſelves and their principal, muſt be preſumed either to have received actual payment of the average loſs from all the underwriters, or to have ſettled with them in account ſome way or other. For the purpoſe of recovering from the defendant, they ſhould have apprized him in Auguſt 1806, of the ſtate of the underwriters, who, he was naturally led to ſuppoſe, had ſettled with the brokers, and their ſilence had deprived him for the ſpace of two years of all opportunity of enforcing the policies of aſſurance. The broker's laches was an anſwer to their demand againſt their principal, and they muſt look to the underwriters, whom they had truſted.—Verdict for the defendant.

Vide Edgar *v.* Bumpſtead 1 Camp. 411.

COMMON

COMMON PLEAS.

FIRST SITTINGS AFTER TERM IN LONDON.

Friday, November 30.

J. MOLLER and T. MOLLER v. LAMBERT.

An action may be maintained upon a bond expreſſed to be payable to a mercantile firm, by the perſons who actually conſtituted the firm when the bond was executed.

ACTION on a bottomry bond executed in Portugal. Plea, *non eſt factum.*

The bond being read, it appeared that the defendant thereby bound himſelf to the "*Widow Moller and Son.*" It was proved that the *Widow Moller* had been dead ſome years before the execution of the bond, and that the plaintiffs, her ſons, have ſince continued to carry on trade under the old firm.

Lens, Serjeant, for the defendant, objected, that however a bill of exchange or promiſſory note might be given to a mercantile firm, — in ſuch a ſolemn inſtrument as a bond, the names of the obligees muſt be ſpecifically mentioned.

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Beſt, contrà, maintained that in this reſpect there was no difference between deeds and ſimple-contract inſtruments, and that a bond given to "Meſſrs. *Childs*" might clearly be ſued upon by the members of that houſe.

Sir JAMES MANSFIELD C. J. thought it was enough if the plaintiffs were proved to be the perſons meant by the *Widow Moller and Son*; and—

They had a verdict accordingly.

Beſt, Serjeant, and *Reader* for the plaintiffs.

Lens, Serjeant, for the defendant.

CALLAGHAN *v.* AYLETT.

THIS was an action on a bill of exchange, drawn by the plaintiff to his own order, upon and accepted by the defendant; *payable at Ramſbottom and Co.'s, Bankers, London.*

If a bill of exchange be accepted payable at a particular place, in an action againſt the acceptor, the plaintiff muſt prove that it was preſented there for payment when it became due.

The declaration ſtated, that the defendant accepted the bill, according to the uſage and cuſtom of merchants.

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The plaintiff's counsel proved the defendant's hand-writing as acceptor of the bill, and there rested their case.

Clayton, Serjeant, for the defendant, objected on the authority of *Ambrose* v. *Hopwood*, 2 *Taunt.* 61. that the plaintiff was bound to prove, that the bill, when it became due, had been presented for payment at Ramsbottom and Co.'s, bankers, where it was made payable.

Marshall, Serjeant, and *E. Lawes*, *contrà*, contended, that this was unnecessary in an action against the acceptor.

MANSFIELD, C. J. saved the point; and the plaintiff had a verdict, subject to the opinion of the Court of C. P. as to the necessity of proving that the bill was presented at the bankers for payment.

A rule *nisi* having been obtained in the ensuing term, for setting aside the verdict and entering a non-suit,——

Marshall, Serjeant, shewed cause. He denied the authority of *Ambrose* v. *Hopwood*, as that was in reality an action against the drawer, and passed without argument. In *Saunderson* v. *Judge*, 2 *H. Bl.* 509. it was solemnly determined, that if a promissory note be made payable at a particular place, this is a mere memorandum, and no part of the contract. This principle has been invariably acted upon since. In *Lyon* v. *Sundius*, 1 *Camp.* 423, Lord ELLENBO-

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ROUGH held, that if a bill of exchange be accepted, payable at a banker's, in an action againſt the acceptor, there is no occaſion to allege or prove that it was preſented there for payment; and in *Wild* v. *Rennards*, 1 *Camp.* 425 *n.* BAYLEY, J. again ruled the ſame way, in an action on a promiſſory note. At any rate, the Court would not order a nonſuit to be entered; but, at moſt, would grant a new trial, as the plaintiff might have given evidence of the conſideration under the money counts.

COURT (*a*). In *Saunderſon* v. *Judge*, the place of payment was a mere memorandum at the foot or on the back of the note. The place where this bill of exchange is made payable, muſt be conſidered as part of the contract between the acceptor and the holder. The perſon on whom a bill is drawn, may accept it generally, or he may accept it ſpecially. This is a ſpecial and qualified acceptance. The defendant undertook, that when the bill became due, it ſhould be paid at *Ramſbottom & Co.*'s;—not that he ſhould be liable upon it univerſally. There was no objection, in point of law, to his limiting his reſponſibility in this manner; and it ſeems fair, that when a party has provided funds at his banker's, for the due ſatisfaction of a bill of exchange, he ſhould be allowed to protect himſelf from the riſk of being arreſted upon it by a malicious creditor. It appears to have been decided by the Court of King's Bench, in *Parker*

(*a*) HEATH, LAWRENCE and CHAMBRE, Juſtices; — *abſente* MANSFIELD, C. J.

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v. *Gordon* (*a*), that if a bill be accepted, payable at a banker's, it muſt be preſented there for payment, to charge the drawer; and it is impoſſible to make any diſtinction for this purpoſe between the drawer and the acceptor.—The rule muſt therefore be abſolute. When the plaintiff confined himſelf to the count upon the bill, he took the riſk of our opinion being againſt him, and the queſtion reſerved for the court was, whether he ought not to have been nonſuited at the trial.

Rule abſolute for entering a nonſuit (*b*).

(*a*) 7 Eaſt, 385. There, the only evidence of preſentment was at the banker's after banking hours, and Lord ELLENBOROUGH ſeems rather to have thought, that if the bill had been preſented perſonally to the acceptor the day it became due, this would have been ſufficient.

(*b*) Q. Will the acceptor be diſcharged if the bill is not preſented for payment at the place where it is made payable, the very day it becomes due? If it is duly preſented and diſhonoured, will the acceptor be entitled to immediate notice of this diſhonour, as in the caſe of the drawer?—Will he be obliged to ſhew that he has been damnified by the laches of the holder, or will it be incumbent on the holder to prove that he had not funds to ſatisfy the bill at the place where payment was to be demanded?

N. B. Since the above was printed, the caſe of *Fenton* v. *Goundry* has been argued on demurrer in the Court of K. B., and the Judges of this Court have ſhewn a ſtrong inclination to overrule the deciſion of the Court of C. P. in *Callaghan* v. *Aylett*. The point being of ſuch importance, the judgment of the Court of K. B., if finally pronounced during E. T. 1811, will be mentioned at the end of this volume.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K.B.

At the Sittings in and after Hilary Term,

51 GEORGE III.

SECOND SITTINGS IN TERM AT WESTMINSTER.

1811.

Saturday, February 2.

COOMBE *v.* MILES.

In an action by the indorſee of a bill of exchange, although it appears that the plaintiff, in diſcounting it, required the indorſer to take part in goods; ſtill, if the latter voluntarily acceded to that propoſal as advantageous to him, the plaintiff is not bound to prove that the goods were of the eſtimated value, and the burthen of proof lies upon the defendant if he would impeach the tranſaction as uſurious.

THIS was an action againſt the defendant as acceptor of a bill of exchange, drawn by *Plimpton, Goddard & Co.*, payable to their own order, and indorſed by them to the plaintiff.—The defence was, that the plaintiff had been guilty of uſury in diſcounting the bill.—It appeared, that when *Plimpton*, one of the drawers, requeſted the plaintiff to diſcount it, he ſaid he would not do ſo, except *Plimpton* would take about £70 worth of ready-made waiſtcoats at a given price.

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Plimpton answered, that he was very ready to take the waiſtcoats, as he thought he could make a profit of them, and the bill was diſcounted by the plaintiff accordingly.

Garrow for the defendant, contended, on the authority of *Davis* v. *Hardacre*, *ante* 375, that the plaintiff was bound to ſhew that the waiſtcoats were of the value charged, as it appeared that he inſiſted upon their being taken by a man who did not want ready made waiſtcoats but caſh for his bill.

Lord ELLENBOROUGH.—Where circumſtances of ſtrong ſuſpicion appear, I think it is fair to call upon the perſon who gives goods in diſcounting a bill of exchange, to ſhew that they were of the real value at which they were charged. But here, although the propoſal to take the waiſtcoats originated with the plaintiff, the other party readily acceded to it, and ſaid he thought he ſhould make a profit by the tranſaction. Upon this evidence, therefore, we muſt rather preſume that the goods were charged beneath their true value; and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the ſcore of uſury.

Verdict for the plaintiff.

Park and *Lawes* for the plaintiff.

Garrow for the defendant.

[Attornies, *Hall* and *Tagg*.]

FIRST

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

ALEXANDER v. GIBSON.

Wednesday, February 13

A servant employed to sell a horse and receive the price, has an implied authority to warrant the horse to be sound; and in an action upon the warranty, it is enough to prove that it was given by the servant, without calling him, or shewing that he had any special authority for that purpose.

ACTION on the warranty of a horse.

A witness was called to prove that the horse had been sold to the plaintiff by the defendant's servant at *East Grinstead* fair, in December 1809, and that the servant then warranted the horse to be sound.

Park, for the defendant, insisted, that the plaintiff was bound either to call the servant himself, or to begin by proving that he had authority from his master to warrant the horse.

Lord ELLENBOROUGH.—If the servant was authorized to sell the horse, and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual, on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business

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ſineſs with which he is intruſted, in the common and uſual manner. I am of opinion, therefore, that if the defendant's ſervant warranted this horſe to be ſound, the defendant is bound by the warranty (*a*).

If a witneſs unexpectedly gives evidence againſt the party calling him, although his evidence cannot be in part relied upon and the reſt of it diſproved, it may be entirely repudiated, and witneſſes may be called on the ſame ſide to contradict him.

The evidence objected to was accordingly received. However, the ſervant himſelf was afterwards voluntarily called by the plaintiff, and ſwore poſitively in his examination in chief, that he was expreſsly forbidden by his maſter to warrant the horſe, and that he had not given any warranty. The plaintiff's counſel, nevertheleſs, called another witneſs to prove, that at the time of the ſale, the ſervant declared that "the horſe was ſound all over."

Park objected that the plaintiff was not now at liberty to contradict his own witneſs.

Lord ELLENBOROUGH. — If a witneſs is called on the part of the plaintiff, who ſwears what is palpably falſe, it would be extremely hard if the plaintiff's caſe ſhould for that reaſon be ſacrificed. But I know of no rule of law by which the truth is on ſuch an occaſion to be ſhut out and juſtice is to be perverted.

(*a*) So if a broker is authorized to advertiſe a ſhip as a general ſhip to any particular port, and in his advertiſement he warrants that ſhe ſhall ſail with convoy, the owners are bound by this warranty, although in giving it the broker may have exceeded his authority. Rinquiſt *v* Ditchell, K. B. Sitt. p. M. T. 40 Geo. 3. Cor. Lord KENYON. Abbott on Shipping. Part II. c. ii. 8.

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In Lowe *v.* Joliffe (*a*), which turned on the validity of a will, all the atteſting witneſſes ſwore to the inſanity of the teſtator when the will was executed; but they were contradicted by other evidence, and the will was eſtabliſhed. The party is not to ſet up ſo much of a witneſs's teſtimony as makes for him, and to reject or diſprove ſuch part as is of a contrary tendency. But if a witneſs is called, and gives evidence againſt the party calling him, I think he may be contradicted by other witneſſes on the ſame ſide, and that in this manner his evidence may be entirely repudiated.

Verdict for the plaintiff.

Garrow and *Abbott* for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Preſland* and *Roberts*.]

(*a*) 1 Bl. Rep. 365. *Vide* Biſhop of Durham *v.* Beaumont, 1 Camp. 207.

HAWLEY *v.* PEACOCK and another.

Wedneſday, February 13.

ACTION of the defendants as acceptors of a bill of exchange.

A deed alleged in a plea to be loſt by time and accident, may be given in evidence, if having been loſt at the time of pleading it is found before trial.—In aſſumpſit, a releaſe may be given in evidence under the general iſſue

Plea 1. the general iſſue; and 2dly, a releaſe loſt by time and accident.

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HEWLEY v. PEACOCK.

The plaintiff's caſe being made out—

The defendants offered to give in evidence, a compoſition deed, with a clauſe of releaſe, executed by the plaintiff, which had been miſlaid at the time of plea pleaded, but had ſince been found.

Garrow for the plaintiff, contended, that upon this record, the defendants could only give evidence of a releaſe loſt by time and accident.

Lord ELLENBOROUGH.—The averment of the loſs of the deed relates to the time of plea pleaded, and applies only to the excuſe of profert. The iſſue joined is, whether the plaintiff did execute ſuch a deed as is ſet out in the plea, whereby this action was releaſed. Therefore, if the deed was loſt, and has been found ſince plea pleaded, I think it may be received in ſupport of the ſpecial plea.—But it may likewiſe be given in evidence under the general iſſue. It has been conſidered, that a releaſe muſt be pleaded ſpecially in trover; but in aſſumpſit, the defendant may entitle himſelf to a verdict upon *non aſſumpſit*, by giving in evidence, any thing to ſhew that the plaintiff had no cauſe of action.

Verdict for the defendant.

Garrow and *Marryat* for the plaintiff.

Park and *Storks* for the defendant.

[Attornies *Vincent* and *Dalton*.]

DOE

Doe d. Baker *v.* Woombwell.

Wednesday, February 13.

EJECTMENT for a meſſuage. The demiſe was laid on the 1ſt of November laſt.

This was a caſe between landlord and tenant from year to year. The receipts for rent were not produced in purſuance to notice, but it appeared, that rent had been paid on the uſual quarter days.

On the 22d of March, a notice was given to quit at the expiration of the current year. No direct evidence was adduced as to when the tenancy commenced. The declaration in ejectment was ſerved on the 16th of January laſt, when the defendant made no objection to the notice to quit, nor ſet up any right to the poſſeſſion of the premiſes, but ſaid he ſhould go out as ſoon as he could ſuit himſelf with another houſe.

Marryat, for the defendant, inſiſted, that there was no evidence to go to the jury, to ſhew that the tenancy had been determined before the demiſe. Unleſs this were a Michaelmas holding, the ejectment could not be ſupported, and there was equal reaſon to ſuppoſe, that the tenancy commenced at Chriſtmas, Lady-day, or Midſummer.

Lord Ellenborough.—I think the defendant's declaration when ſerved with the ejectment, is evidence to go to the jury, that this was a Michaelmas holding.

A notice was given on the 22d of March by a landlord to his tenant to quit at the expiration of the current year. A declaration in ejectment laying the demiſe on the 1ſt of November, was on the 16th of January following ſerved upon the tenant, who at the time made no objection to the notice to quit, but ſaid he ſhould go out as ſoon as he could fit himſelf. This held to be *primâ facie* evidence, that the tenancy commenced at Michaelmas and was determined before the day of the demiſe.

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If they believe he merely meant to ſay, that rather than involve himſelf in litigation, he would quit poſſeſſion as ſoon as he could get another houſe, although he could not be legally turned out then,—there is nothing to fix the commencement of the tenancy, and he will be entitled to a verdict; but from his making no objection at the time he was ſerved with the ejectment, and giving a qualified promiſe to leave the premiſes, he may be underſtood to have admitted, that the tenancy had been determined by the notice, and that the action was well brought. If the latter conſtruction ſhould be put upon his words, there muſt be a—

Verdict for the leſſor of the plaintiff.

Park and *Littledale* for the leſſor of the plaintiff.

Marryat for the defendant.

[Attornies, *Burt* and *Vincent*.]

A notice to quit, if not ſerved perſonally upon the tenant in poſſeſſion, is no evidence to prove the commencement of the tenancy. *Doe d Aſh* v. *Calvert*, *ante*, 388. But if the notice to quit be ſerved perſonally upon the tenant in poſſeſſion, and he makes no objection to the time when he is deſired to quit, this is *prima facie* evidence that the tenancy commenced at the ſeaſon of the year when the notice expires. *Thomas d. Jones & Wife* v. *Reece Thomas*, *poſt*. *Doe d. Clarges Bart.* v. *Foſter*, *K. B. E. T.* 51 *Geo*, 3. 13 Eaſt.

Henderson

HENDERSON and SMITH *v.* WILD.

Saturday, Feb. 16.

THIS was an action for goods ſold and delivered.

The plaintiffs had been in partnerſhip as warehouſemen, and ſold the goods in queſtion to the defendant, on the 6th of April 1809, and the 1ſt of February 1810. On the 25th of October 1810, they diſſolved their partnerſhip, and on the 27th of the ſame month, publiſhed an advertiſement in the London Gazette, giving notice of the diſſolution, and intimating that all debts due to the partnerſhip, ſhould be paid to *Henderſon* only.

On the part of the defendant, two receipts, ſigned by the plaintiff *Smith*, were put in and proved, one bearing date the 21ſt March 1810, for the amount of the firſt parcel of goods; and the other, bearing date the 10th July 1810, for the amount of the laſt parcel.

Garrow, for the plaintiffs, ſtated, that no money had paſſed when theſe receipts were granted; that the defendant being a tailor, had done buſineſs on the ſeparate account of *Smith*, which was attempted to be ſet off againſt the goods ſold by the partnerſhip; and moreover, that the receipts, although dated in March and

If A and B are in partnerſhip, and C owes them a ſum of money on the partnerſhip account, a receipt for this given by A upon ſetting off a private debt due from himſelf to C, will be a bar to an action by A and B againſt C, for the debt due to the partnerſhip; but, if after a diſſolution of partnerſhip between A and B, and a notice in the Gazette that all debts due to the partnerſhip ſhall be paid to B, A colluſively gives C a receipt for the debt, dated anterior to the diſſolution of the partnerſhip, the receipt is void, and an action may ſtill be maintained againſt C for the debt, in the names of A and B.

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and July 1810, had not in fact been given till after the partnership was dissolved, and the advertisement had appeared in the Gazette. But at whatever time the receipts had been given, as no joint consideration passed to the plaintiffs, it was contended that they were no bar to the action.

Lawes, for the defendant, allowed that the receipts had been given upon a set-off of *Smith*'s separate debt against the debt jointly due to the partnership. He denied, that in point of fact they had been given at a time subsequent to their respective dates; but whensoever given, he maintained the plaintiffs were estopped by them. Here was an acknowledgment of payment under the hand of one of the plaintiffs on the record, who could not pretend that he had signed it ignorantly, or that any fraud or deceit had been practised upon *him*. Bauerman *v.* Radenius, 7 T. R. 663. and Alner *v.* George, 1 Camp. 392. were cited as in point.

Lord ELLENBOROUGH was of opinion, that if the receipts had been given *bonâ fide* at the times they bore date, they would have been a bar to the action, though the defendant did not pay the price of the goods for the benefit of both the plaintiffs; but that if they were in reality not given till after the dissolution of partnership, and the advertisement in the Gazette, they were to be considered fraudulent and void.

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The evidence, which was doubtful, being closed, His Lordship left it to the jury to say, when the receipts had been given.—The jury thought that they had been fabricated after the dissolution and advertisement; and therefore, by His Lordship's direction, found a verdict for the plaintiffs,—which, upon a motion for a new trial in the ensuing term, was approved of and confirmed by the Court of K. B.

Garrow and *Barrow* for the plaintiffs.

Lawes for the defendant.

[Attornies, *Caton* and *Wilson*.]

Vide Ridley v. Taylor 13 East, 175.

REX *v.* FISHER and others.

Saturday, February 16.

It is libellous to publish the preliminary examinations taken *ex parte* before a magistrate previous to committing a man for trial or holding him to bail for an offence with which he is charged; the tendency of such a publication being to prejudice the minds of jurymen against the accused, and to deprive him of a fair trial.

THIS was an indictment against the printer, publisher and editor of a newspaper called The DAY, for the publication of a libel upon one *Richard Stevenson*.

The indictment stated, that before the printing and publishing of the scandalous, defamatory and malicious

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malicious libel therein afterwards mentioned, to wit, on the 8th day of October, in the 50th year, &c. one Mary Popplewell preferred to and before the Right Honourable Thomas Smith, then and ſtill continuing to be Mayor of the City of London and one of the keepers of the peace and juſtices of our ſaid Lord the King aſſigned to keep the peace and alſo to hear and determine divers felonies, treſpaſſes and miſdemeanors, committed within the ſaid City of London, a certain charge againſt the ſaid Richard Stephenſon (that is to ſay) a charge, that the ſaid Richard Stephenſon had, on the high ſeas, within the juriſdiction of the admiralty of England, on board a certain ſhip, unlawfully made an aſſault upon her the ſaid Mary Popplewell, with intent her the ſaid Mary Popplewell, feloniouſly and againſt her will, to raviſh and carnally to know; to wit, at &c. and that the defendants well knowing the premiſes, but being malicious and ill-diſpoſed perſons, and deviſing and intending to traduce, defame, and aggrieve the ſaid Richard Stephenſon, and to injure and prejudice him in the minds of the liege ſubjects of our Lord the King, and to cauſe it to believed, that he was guilty of the ſaid aſſault, and thereby to prevent the due adminiſtration of juſtice, and to deprive the ſaid R. S. of the benefit of an impartial trial, for and concerning the matter of the ſaid charge, did, on the 12th day of October, in the 50th year, &c. at &c. wilfully and maliciouſly print and publiſh, and cauſe and procure to be printed and publiſhed, a certain ſcandalous, malicious and defamatory libel, of and concerning the ſaid charge and the matter thereof, which ſaid ſcandalous and malicious libel

was

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was and is according to the tenor and effect following, (that is to ſay) "Police.—Manſion Houſe. The Captain, for whoſe apprehenſion a warrant has been iſſued, as we ſtated in our yeſterday's paper, was apprehended on Wedneſday afternoon by two of the city officers, at the houſe of his attorney, and underwent a private examination before the Lord Mayor yeſterday morning. His name is Stephenſon and the charge preferred againſt him was, for aſſaulting Mrs. Popplewell, the wife of Mr. Popplewell, who, we underſtand, is attached to the commiſſariat department in the Iſle of Barbadoes, with intent to commit a rape on board his own ſhip, the Mentor, on her paſſage to England. The circumſtances of this caſe, ſo diſgraceful to Captain Stephenſon, are, we underſtand, as follows: — Mrs. Popplewell embarked at the Iſle of Barbadoes on board the Rachael, Captain Carr, being one of the laſt Weſt India convoy, amongſt which was alſo the Mentor, commanded by Captain Stevenſon, with intent to join her huſband in London. In the courſe of the voyage, a dead calm ſtopped the progreſs of the fleet, and mutual viſits were paid from the different ſhips; amongſt others, the paſſengers and officers of the Rachael, were invited to partake of a repaſt on board the Mentor, and Mrs. Popplewell, accompanied by Captain Carr and ſome other perſons, accordingly proceeded in the ſhips' boat to the veſſel, where they were hoſpitably received and luxuriouſly entertained by Captain Stevenſon, who was peculiarly marked in his attentions to Mrs. Popplewell during the day. While the party were enjoying the pleaſures of the feaſt, however, a briſk gale ſprung up, and the ſurface

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ſurface of the ocean, which had previouſly been undiſturbed by the ſlighteſt zephyr, became now agitated with conſiderable fury, to the no ſmall alarm of Mrs. P., who became exceedingly deſirous to return to her own ſhip. From this ſtep, however, ſhe was deterred by the roughneſs of the ſea. In this dilemma, Captain Stephenſon, with much apparent politeneſs, begged ſhe would not make herſelf uneaſy, obſerving, if ſhe was not afraid to remain under his protection, he would give her ſuch accommodation, and endeavour to conſult her comfort and happineſs in ſuch a manner, as to leave her no ground to lament her temporary abſence from the Rachael. After ſome perſuaſions, Mrs. P. agreed to accept the offer, as from the increaſing ſtrength of the wind, ſhe ſaw there were no hopes of her being able to get back that night by the boat, without being expoſed to hardſhips extremely unpleaſant for a female to encounter. Captain Carr and his male friends therefore quitted the ſhip, leaving Mrs. Popplewell behind them, and returned to the Rachael. The ſtate cabin was then prepared by Captain Stevenſon's directions for his fair viſitor, to which ſhe ſoon after retired, but had not remained there long, when the obtruſion of the Captain upon her privacy, excited no little aſtoniſhment, which, from his ſubſequent conduct, encreaſed to the utmoſt alarm. He commenced his attack by apologizing for his entrance, and by aſcribing his unexpected viſit to the impreſſion which the charms of Mrs. Popplewell had made upon his too ſuſceptible heart. He proceeded in the ſame ſtrain of fulſome flattery for ſometime; but finding that his eloquence had no other

effect than to raiſe the indignation of his innocent viſitor, he proceeded from words to deeds, and having, in the firſt inſtance, imprinted ſome impaſſionate kiſſes, he took ſome other liberties with the perſon of Mrs. P. which delicacy forbids our deſcribing, but which ſo far irritated and terrified Mrs. P. that ſhe ſhrieked with the utmoſt violence. Her cries at length attracted the attention of a gentleman named *Auſtin*, who was a paſſenger in the veſſel, and who inſtantly ruſhed to the ſpot, in time to prevent the perpetration of the vile and diſhonourable intentions of the Captain, from whoſe loathſome embrace he extricated his almoſt ſenſeleſs victim. The enſuing morning, Mrs. P. returned to the Rachael, and on her arrival in this country, inſtantly informed her huſband of the atrocious manner in which ſhe had been treated, and immediate application was made for a warrant, in conſequence of which, the criminal is likely to meet the legal puniſhment of his villainy. The reſult of the examination yeſterday was, that the Captain was himſelf held to bail in £1000, with two ſureties in £500 each, to anſwer for his appearance at the Admiraly Seſſions or Court of King's Bench, as the parties may think fit, to take his trial for the offence. Mrs. Popplewell is a woman of an intereſting and intelligent countenance, about five and twenty years of age. The Captain had nothing either captivating or prepoſſeſſing in his appearance, and is about 30. He did not ſeem the leaſt affected at his diſgraceful ſituation, nor to feel, in the ſlighteſt degree, the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct. He employed a ſhort hand

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hand writer, a barriſter, and a phalanx of friends, if poſſible, to intimidate his accuſer by the publicity of her expoſure. Notwithſtanding theſe attempts, however, to ſcreen himſelf behind her delicacy, ſhe gave her teſtimony in the cleareſt and moſt collected manner, which conſcious innocence and innate virtue could only have enabled her to accompliſh. This was the only examination which occurred at this office worth detailing." To the great damage, &c.

In ſupport of the firſt averment in the indictment, the depoſition was given in evidence which Mrs. *Popplewell* had made before the Lord Mayor. The facts ſtated in this were not materially different from the narrative part of the libel, except that the outrage was ſworn to have been committed in a voyage from England to the Weſt Indies.

Marryat, for the defendants, inſiſted, that the publication could not be conſidered a libel, as it contained a juſt and true account of a judicial proceeding. He relied upon *Curry* v. *Walter*, 1 *Boſ. & Pul.* 525, in which the Court of Common Pleas held, that an action could not be maintained, for publiſhing a true account of the proceedings of a court of juſtice, however injurious ſuch publication might be to the character of an individual, — and *Rex* v. *Wright*, 8 *T. R.* 293. where the Court of King's Bench refuſed to grant a criminal information againſt a bookſeller as for a libel in printing a true but unauthoriſed copy of a report of the Houſe of Commons,

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which reflected on the character of an individual, and the doctrine was broadly laid down, that it is neither the ſubject of a criminal proſecution, nor of an action for damages, to publiſh a true account of the proceedings in parliament, or of courts of juſtice. That doctrine has been ſince invariably recognized, and was lately acted upon in the caſe of *Rex* v. *Forbes*, before Mr. BARON THOMPSON, at *Wincheſter*.—Proceedings before magiſtrates, ſtand upon the ſame principle. It is of the utmoſt importance, that ſuch proceedings ſhould be public, and if individuals in any inſtance are thus injured more deeply by groundleſs charges being brought againſt them, they have their remedy againſt their accuſers. There is no danger of perſons committed being deprived of a fair trial by means of ſuch publications. As they are known to be *ex parte*, implicit credit is not given to them, and men keep their judgments ſuſpended, till the day of trial arrives. Beſides, the law does not ſuppoſe that jurymen are entirely ignorant, when they come into the box, of the matters they have to try; for they were required to come from the neighbourhood of the place where the offence was committed; and it is well known, that when any caſe of public intereſt ariſes, it is univerſally talked of, and innumerable reports concerning it are whiſpered abroad, from which the minds of jurymen are in much greater danger of being poiſoned, than from authentic accounts of the informations upon oath before the committing magiſtrate. The ſenſe of the legiſlature has been lately declared upon this ſubject. A bill was introduced into parliament to prohibit theſe publications (which ſhews, that they

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were not unlawful before); but the opinion of enlightened men being, that the general benefit arising from them outweighs the private inconvenience, the bill was dropped.

Lord ELLENBOROUGH.—If any thing is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before, *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? By their own public declarations we know that the minds of jurymen are often pre-occupied by such statements, and that they proceed with terror to the discharge of their duty, from the apprehension that an antecedent bias may influence their verdict. These publications tend alike to the conviction of the innocent and the acquittal of the guilty. I fully accede to the cases cited on the part of the defendant. But how can the publication of preliminary examinations taken *ex parte* be brought within the scope of these determinations? The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. What is injurious to individuals and to the community the law considers criminal. — To look to the case before us,—it must be the anxious wish of all that the person accused

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accuſed by this lady ſhould have a fair and impartial trial. The honour and ſecurity of the female ſex are involved in the iſſue. Does this publication leave the mind in a ſtate of equipoiſe as to his guilt or innocence? No one, with the feelings of a man, can read it without being rouſed to indignation againſt the perſon whoſe miſconduct is depicted in ſuch glowing colours. Even if a fair and diſpaſſionate account of the examination were allowed, is this account fair and diſpaſſionate? It comes to concluſions which would only be fair after verdict. It aſſumes every thing that the woman ſaid to be true, and repreſents the accuſed as conſcious of his guilt. It talks "of the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct," and triumphantly aſſerts that "he is likely to meet the legal puniſhment of his villainy." Allowing the utmoſt latitude to fair and candid ſtatement, is this to be tolerated? Jurors and judges are ſtill but men; they cannot always controul feelings excited by ſuch inflammatory language. If they are expoſed to be thus warped and miſled, injuſtice muſt ſometimes be done. Trials at law fairly reported, although they may occaſionally prove injurious to individuals, have been held to be privileged. Let them continue ſo privileged. The benefit they produce is great and permanent, and the evil that ariſes from them is rare and incidental. But theſe preliminary examinations have no ſuch privilege. Their only tendency is to prejudge thoſe whom the law ſtill preſumes to be innocent, and to poiſon the ſources of juſtice. But what defence can be made for a publication like this, which, beſides containing an

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ex parte ſtatement of evidence before a magiſtrate againſt a man who has had no opportunity to defend himſelf, actually denominates him *a criminal*, and deſcribes him as a monſter? It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial ſhould be guarded againſt. Every one of us may be queſtioned in a court of law, and called upon to defend his life and his character. We would then wiſh to meet a jury of our countrymen with unbiaſſed minds. But for this there can be no ſecurity if ſuch publications are permitted. The neceſſary tendency of the libel was, in the language of the indictment, to traduce and defame the proſecutor, and to prejudice him in the minds of his countrymen, and to cauſe it to be believed that he was guilty of the aſſault laid to his charge, and to deprive him of the benefit of an impartial trial. If ſo, the law infers that ſuch was the intention of the defendants in publiſhing it, and they muſt anſwer for the injury they have thus done to the proſecutor individually, and to the community of which he is a member.

The defendants were found guilty.

Garrow and *Gurney* for the proſecution.

Marryat and *Marriott* for the defendants.

Vide Stiles v. Nokes, 7 Eaſt, 493.

THOMPSON

THOMPSON *v.* MABERLY.

Monday, February 18.

ASSUMPSIT for the use and occupation of furnished apartments.

If premises are taken "for 12 months certain, and fix months' notice to quit afterwards," the tenancy may be determined by a fix months' notice to quit expiring at the end of the first year.

Plea, the *general issue*, except as to £63. 10*s*.—and as to that *a tender*.

The sum claimed by the plaintiff was £93. 10*s*.

On the 28th of November 1808, the defendant took the apartments "*for 12 months certain, and fix months' notice afterwards.*" The year was to begin from the 25th of December following; but he entered on the first of that month, and the odd sum of £3. 10*s*. was for rent during this interval. On the 25th of May 1809 the defendant gave notice that he should quit at the end of the year, and he accordingly quitted the apartments before the following Christmas.

Topping, for the plaintiff, contended, that the defendant, under the above taking, was not at liberty to quit till fix months' notice had been given after the expiration of the first year.—But—

Lord ELLENBOROUGH was clearly of opinion that the defendant was only bound to remain the 12 months certain, and that he was at liberty to quit at the end of

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that period, by giving ſix months' previous notice. His Lordſhip laid conſiderable ſtreſs upon the word *certain*, applied to the firſt 12 months, which ſhewed that every thing afterwards was *uncertain*, and depended on the notice.

However, there being an irregularity in the tender, the plaintiff had a verdict with nominal damages.

Topping and *A. Moore* for the plaintiff.

Garrow for the defendant.

[Attornies, *Baxter* and *Daniel*.]

But a demiſe, "not for one year only, but from year to year," enures as a demiſe for two years at leaſt. Dennd. Jacklin v. Cartwright, 4 Eaſt, 29; and ſo of a demiſe "for a year, and ſo from year to year." Birch v. Wright, 2 T. R. 380.

Tueſday, February 19.

REES v. MARQUIS OF HEADFORT.

In an action by the indorſee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what conſideration he gave for it.

THIS was an action againſt the defendant as acceptor of a bill of exchange, drawn by one *Whitton*, payable to his own order, indorſed by him to *Chamberlaine & Co.* and by them to the plaintiff.

The plaintiff made out a *primâ facie* caſe; but *Whitton*, the drawer, having been called to prove the handwriting of one of the parties, it appeared from his croſs examination, that he himſelf had never received

ceived any consideration for the bill, and had been tricked out of it by means of a grofs fraud.

Lord ELLENBOROUGH held that on this ground the plaintiff was bound to prove what consideration he gave for it; and as he was not prepared to do so, his Lordship directed a nonsuit.

Park and *Comyn* for the plaintiff.

Garrow and *Topping* for the defendant.

[Attornies, *A'Beckett* and *Evans*.]

S. P. where the bill was drawn without consideration and under *duress*. Duncan *v.* Scott, 1 Camp. 100.

COLWILL *v.* REEVES.

Tuesday, February 19.

A shopkeeper may maintain trespass for taking goods sent to him on *sale or return*.

TRESPASS for breaking and entering the plaintiff's house, and taking his goods. — Plea, the *general issue*.

The plaintiff was stated to carry on the business of a furniture broker at the house in question; and it appeared that (amongst other things) a sofa, sent to him *on sale or return*, had been carried away by the defendant as part of the goods of one *Grindley*, a bankrupt, who

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who had carried on the ſame buſineſs in the ſame houſe.

Park objected that the plaintiff could not maintain treſpaſs for this ſofa, as the property in it while unſold continued to abide in the original owner, and the plaintiff was merely his ſervant to take care of it. But

Lord ELLENBOROUGH held that the plaintiff had a ſpecial property in the ſofa, which, coupled with the poſſeſſion, enabled him to maintain treſpaſs for it in his own name.

If A for a fraudulent purpoſe mixes his goods with B's, ſtill if they can be diſtinguiſhed, he retains the property in them, and he may maintain treſpaſs againſt a perſon who having a right to take B's goods, ignorantly takes theſe goods of A as part of B's.

Park opened as a complete defence to the whole action, that *Grindley* alone had really carried on the buſineſs in this houſe; that becoming bankrupt, it was concerted, for the fraudulent purpoſe of protecting his goods from his aſſignees and his creditors, that the plaintiff ſhould ſend into the houſe ſome articles of furniture to be mixed with his; that the plaintiff with this view ſent in the goods for which the action was brought; and that they were ignorantly taken by the meſſenger under the commiſſion, as part of the effects of *Grindley*.

Lord ELLENBOROUGH.—If a man puts corn into my bag, in which there is before ſome corn, the whole is mine; becauſe it is impoſſible to diſtinguiſh what was mine from what was his. But it is impoſſible that articles of furniture can be blended together ſo as to create the ſame difficulty. The goods in queſtion re-

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mained distinct, and the messenger might have discovered that they belonged to the plaintiff. He took them at his peril. Whatever fraud there might be in the case, the property was not divested from the plaintiff, and the stratagem described is no defence on the general issue to an action at his suit for taking and converting the goods.

The plaintiff had a verdict on the *asportavit*.

Garrow, *Jekyll*, and *Marryat* for the plaintiff.

Park and *Storks* for the defendant.

[Attorniet, *Williams* and *Mills*.]

If A embroiders B's cloth, or converts his metal into vessels or utensils, the property of the materials in their improved state still remains in B; but if A makes oil or wine of B's olives or grapes, this being a new species of commodity, it belongs to A and he shall render a compensation to B for the materials. If A wilfully intermixes his money, corn, or hay, with that of B without his approbation, or casts gold into B's crucible, our law gives the entire property, without any account, to B, whose original dominion is invaded; though the civil law allows a satisfaction to A for what he has so improvidently lost. *Vide* 2 Bl. Com. 404, 5, and the authorities there referred to.

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Wednesday, February 20.

REX *v.* WITHERS and Others.

An attorney is not at liberty to diſcloſe in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cauſe before the Court.

THIS was an indictment for breaking open the houſe of one *Copland*, the proſecutor, and aſſaulting and impriſoning his perſon.

On the part of the defendants, Mr. *Phillipſon*, an attorney, was called to ſtate that the ſame day the aſſault was committed, the proſecutor conſulted him profeſſionally, and gave an account of the tranſaction materially at variance with his teſtimony in the witneſs-box; and that on the ſame occaſion a Mr. *Bruce* who accompanied him, had in his hearing directed Mr. *Phillipſon* to bring an action of treſpaſs againſt the defendants, for breaking and entering the houſe now repreſented to be the proſecutor's, as the houſe of him Mr. *Bruce*.

It was objected that the whole that paſſed between Mr. *Phillipſon*, and the proſecutor and *Bruce*, on this occaſion, was privileged on the ſcore of profeſſional confidence.

Garrow, for the defendants, inſiſted that at any rate the privilege could not extend to what was ſaid by *Bruce* in the proſecutor's hearing; that this was a communication by a third perſon to his attorney; and as *Bruce* was no party to this proſecution, no objection could be made on his behalf to the diſcloſure. But

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Lord ELLENBOROUGH said, that an attorney is not at liberty to diſcloſe what is communicated to him confidentially by a client, although the latter be not in any ſhape before the Court; and Mr. *Phillipſon* was not permitted to be examined.

The defendants were found guilty.

Topping and *Marryat* for the proſecutor.

Garrow and *Gurney* for the defendants.

[Attornies, *Fothergill* and *Reilly*.]

Vide Wilſon v. Raſtall, 4 T. R. 753.

Thurſday, February 21.

WILSON and Others, Aſſignees, &c. *v.* BALFOUR.

Bankers having fraudulently ſold out ſtock belonging to a cuſtomer, which ſtood in their names, and applied the proceeds to their own uſe; while they remained ſolvent wrapped up certain bonds belonging to them in an envelope inſcribed with the cuſtomer's name, and incloſing a memorandum, ſtating that they had depoſited the bonds with him as a collateral ſecurity for his ſtock, which they promiſed to replace: This parcel they in fact depoſited among the ſecurities belonging to other perſons who dealt with them, but gave no information of any of theſe circumſtances to the cuſtomer till the eve of their bankruptcy, when they ſent him the parcel with the bonds, ſaying they muſt ſtop payment next morning. *Held* that the cuſtomer could not retain the bonds againſt the aſſignees of the bankers.

THIS was an action of trover, brought by the aſſignees of the partners in the late banking-houſe of *Devaynes & Co.* for certain bonds which had belonged to them, of the value of £16,000.

Devaynes & Co. were the defendants' bankers, and

he

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he had £16,000 navy 5 per cents ſtanding in the name of *Noble*, one of the partners. On the 19th and 21ſt of July 1810, the houſe being preſſed for caſh, *Noble* ſold out the whole of the defendant's 5 per cents, and applied the proceeds to the partnerſhip purpoſes. On the laſt of theſe days, *Noble* incloſed the bonds in queſtion, which belonged to the partnerſhip, in an envelope. Along with them he put in a memorandum in his own hand-writing to the following effect: "Borrowed and received of J. Balfour, Eſq. £16,000 navy 5 per cents, which we promiſe to replace, and we have depoſited with him, as collateral ſecurities, theſe bonds of the Earl of Oxford and Mortimer, and others, which we promiſe to aſſign when required." He then ſealed up the bonds, and wrote upon the envelope, "The property of John Balfour, Eſq." This packet he depoſited in an iron cheſt among the ſecurities belonging to other cuſtomers. There it lay till the 30th of July. In the interval there had been a great run upon the houſe, and the partners now intimated to the clerks that they muſt ſtop the next morning. In the evening of this day *Noble* ſent off the packet with the bonds to the defendant, accompanied with the following letter:

"Sir,

"Having made uſe of your navy 5 per cents which ſtood in our name, we ſend you the incloſed ſecurities to indemnify you againſt any loſs, as we ſhall be obliged to ſuſpend our payments to-morrow morning."

This

This was the first intimation ever made to the defendant that his 5 per cents had been sold, or that the bonds had been appropriated to his use.

Mr. *Noble* was examined as a witness, and stated, that at the time when he inclosed the bonds in the envelope, and until the 30th of July, he had no idea the house must stop, although they had been for some time in difficulties; he intended, had they gone on, to have replaced the stock of the defendant, who in that case would never have known of its being sold; they might have taken the bonds at any time from the iron chest, and disposed of them as partnership stock.

It was proved that the partners all committed acts of bankruptcy on the 31st of July, the day on which the commission bore date.

Park, for the defendant, allowed that if the letter of the 30th had been the first appropriation of these bonds to his use, he would have no right to retain them, as that letter was evidently written in contemplation of bankruptcy. But the transaction was to be referred back to the 21st, when no apprehension was entertained of the house being insolvent. If the bonds had been then assigned to the defendant, there could be no doubt that the property in them would have been transferred to him, and without the assignment he had the same right to them in equity. He had a lien upon them for the value of his 5 per cents. They were ear-marked, and ceased to form a part of the general partnership property. *Noble* was the defendant's

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ant's agent as well as a partner in the banking houſe. Therefore, when depoſited in the iron cheſt, they were to be conſidered as in the defendant's poſſeſſion.

Lord ELLENBOROUGH.—I am of opinion that the defendant has no right to the bonds in queſtion. You ſay he has a lien upon them. A lien means a right to hold. But the defendant never held theſe bonds; he had no poſſeſſion of them till the very eve of the bankruptcy, when it is conceded the bankrupts could not give a preference to one creditor over the others. On the 21ſt and down to the 30th, they only *intended* to deliver the bonds to the defendant. The whole reſted in *intention*. The poſſeſſion was never put out of themſelves. *Noble* was no agent of the defendant for the purpoſe of receiving the bonds. The defendant was entirely ignorant of the tranſaction. *Noble* was a wrong doer in ſelling the 5 per cents; and after that breach of truſt, the defendant was placed in the ſame ſituation as the other creditors of the houſe. A contemplated appropriation cannot be a virtual transfer. Had the memorandum been true, had the bonds been *depoſited* with the defendant, he would have had an equitable title to them, and might have retained them till his debt was ſatisfied. But they were not depoſited with him; they remained in the poſſeſſion of the bankrupts; they might have been taken from the iron cheſt and carried into the market without his ever knowing that his name had been written on the envelope. Had the affairs of the company been retrieved, his ſtock would have been replaced, and he never would have heard of theſe bonds that are ſuppoſed

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posed to have been deposited with him. The memorandum recites a false state of facts. *Noble* merely put down upon paper an idea floating in his brain. No legal or equitable right to the bonds was transferred by his act. It is a case of extreme hardship on the part of the defendant; but the rules of law must not bend to our feelings or our wishes.

Verdict for the plaintiffs.

Park in the ensuing term brought the point before the Court; but the Judges were all clearly of opinion that the direction at *Nisi Prius* was right, and refused a rule to shew cause why there should not be a new trial.

The *Attorney General*, *Garrow*, and *Richardson* for the plaintiffs.

Park and *Topping* for the defendant.

[Attornies, *Clayton* and *Seymour*.]

REX v. HUNT and Another.

Friday, February 22.

THIS was an information by His Majesty's Attorney General, for a libel in a newspaper called *The Examiner*.

The defendant may be found guilty upon a count in an information which charges him with having "*composed*, printed, and published" a libel, if he is proved to have *published* without having *composed* it.

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The first count in the information charged that the defendants *composed*, *printed*, and *published* the libel. There were other counts for printing and publishing, and for publishing only.

The Counsel for the Crown merely adduced the evidence required by stat. 38 Geo. 3. c. 78 (*a*) viz. a certified copy of the affidavit sworn by the defendants at the stamp office, and a newspaper corresponding with the title of the newspaper described in the affidavit.

Brougham, for the defendants, contended that they must be acquitted on the first count, which charged them with *composing* the libel as well as printing and publishing it. This was a distinct and aggravated offence. If a man was both the author and publisher of a libel, he was guilty of a higher breach of the laws, and deserved a greater measure of punishment, than if he merely published what had been written by another and the tendency of which he himself might not understand. Here, although the evidence given was, according to the statute, sufficient to shew that the defendants had published the paragraph charged to be libellous, there was no evidence to shew that they were concerned in its composition.

Lord ELLENBOROUGH.—It is enough to prove publication. If an indictment charges that the defendant did and caused to be done a particular act, it is enough

(*a*) *Vide* Rex v. Hart and White, 10 East, 94.

to

to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified.

The Jury found a verdict of *Not Guilty*.

The *Attorney General*, *Garrow*, *Abbott*, and *Richardson* for the Crown.

Brougham and *E. Lawes* for the defendants.

Vide Regina v. Ingram, Salk. 384. Rex v. Williams, *post*.

ADJOURNED SITTINGS IN LONDON.

Monday, February 25.

WIENHOLT *v.* ROBERTS.

In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by the plaintiff to the defendant, which the latter effected with a *del credere* commission.

ACTION for premiums of insurance by an underwriter against an insurance broker.

The defence was, a set-off to a larger amount than the sum claimed. It was stated, that the plaintiff had underwritten to the defendant a policy on the ship *Margaret*; that an average loss had happened upon this policy, which the plaintiff himself had acknowledged amounted to £15. 6*s*. 9*d*. *per cent.*; that the defendant had a *del credere* commission from the insured for guarranteeing the solvency of the plaintiff and the other underwriters, and that the defendant had therefore a right to set off this loss against the premiums.

Garrow, for the plaintiff, denied that these were mutual debts, the loss being due to the insured only, though receivable by the defendant as their agent, and pointed out the embarrassing situation in which the underwriter would be placed, if he could be called upon, both by the insured and the broker, to pay the loss, and if either of them could set it off to an action at the underwriter's suit.

Lord

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Lord ELLENBOROUGH.—The broker, with a *del credere* commiſſion, may be looked upon as the owner of the policy; and he being anſwerable to the inſured for the loſs, the amount may be conſidered as due to him, and may be ſet off in an action brought againſt him by the underwriter for premiums. Therefore, if the defendant proves the facts opened, he will be entitled to a verdict.

But the *del credere* commiſſion being in writing, could not be regularly proved, and there was a verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Topping for the defendant.

[Attornies, *James*, and *Maſon*.]

Vide Grove *v.* Dubois, 1 T. R. 112. Bize *v.* Dickaſon, *Ib.* 285.

COCK *v.* TAYLOR and Another.

Tueſday, February 26.

THIS was an action for the freight of goods brought from Algiers to London, in the ſhip *Whim*, of which the plaintiff was maſter.

If by a bill of lading goods are made deliverable to A. or his aſſigns, he or they paying freight for the ſame, and A. aſſigns the bill of lading to B. and B. aſſigns it to C., who accepts the goods under it, C. is liable to an action for the freight at the ſuit of the maſter of the ſhip.

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The bill of lading stated the goods to be shipped by Robert Montgomery and Co. "to be delivered at London, unto the order of Messrs. Hargreaves and Dalzel, or to their assigns, he or they paying freight for the same as customary, with primage and average accustomed."

This bill of lading was indorsed by *Hargreaves & Dalzel*, to *Algar*, to *William Innes*, to *Gilmour*, and by him to *Taylor & Son*, of *London*, the defendants, to whom the goods were delivered.

Park, for the defendants, contended, that an action for freight could not be maintained against the assignees of the bill of lading. The captain had a lien upon the goods for his freight; but if he chose to part with them, he must resort to the contract on which the goods were shipped, and proceed against the original parties to the bill of lading. The persons primarily liable for the freight could not, by their own act, in assigning the bill of lading, transfer that liability, and give a right of action against a stranger. And the case of *Artazza* v. *Smallpiece*, 1 *Esp. N. P. Cas.* 23. was relied upon as in point.

Lord ELLENBOROUGH.—The bill of lading makes the goods deliverable to Hargreaves and Dalzel, or their assigns, he or they paying freight for the same. The defendants, by becoming assignees of the bill of lading and receiving the goods, adopt the contract. They were aware on what terms the goods were to

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be delivered, and by accepting them they accede to thoſe terms. They derive a benefit from the plaintiff's ſervices, and muſt be ſuppoſed to promiſe him a recompence. There is no transfer of contract or right of action. Till the delivery, there was no debt due from any one, and the aſſignees then became liable. The bill of lading may be conſidered to have been in blank, and to have been filled up with the name of the perſon to whom the delivery is made. The liability is to devolve upon a ſort of floating appointee, and when he is determined, he is ſuppoſed to be a party to the bill of lading, and to enter into the contract with the maſter which is therein contained. To whom do *Hargreaves* & *Dalzel* order the goods to be delivered?—To *Taylor* & *Son*, the defendants. They take them, and they muſt pay the freight.

Verdict for the plaintiff.

In the enſuing term, *Park* applied for leave to enter a nonſuit, contending, that after the captain had parted with the goods, his only remedy was an action againſt the original parties to the bill of lading. But the Court thought, that the defendants, by accepting the goods, entered into an implied undertaking to pay the freight, and a rule to ſhew cauſe was refuſed.

Garrow and *Taddy* for the plaintiff.

Park and *Lawes* for the defendants.

[Attornies, *Kaye* & *Freſhfield*, and *Thomas*.]

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As to the liability of the consignee, *vide* Roberts *v.* Holt, 2 Show. 443. Where goods, by the bill of lading, are deliverable to the consignee, on his paying freight for the same, if they are delivered to the consignee, the freight cannot be recovered from the consignor. Penrose *v.* Wilkes, Abb. Shipp. Part 3. c. 7. s. 14.

Tuesday, February 26.

MILLER *v.* BRANT.

Where it is provided by a ship's articles, that any of the crew who shall absent themselves from the ship without leave, shall forfeit their wages, if, after one of the crew has so absented himself, the master receives him back again and allows him to work like the others, the forfeiture is waived, and the wages are recoverable.

THIS was an action by a foreign seaman against his captain, for wages earned on a voyage from *Russia* to the port of *London*.

The defence was, that the plaintiff had signed articles, whereby it was provided that if any of the crew should absent themselves from the ship before she was unloaded, without the master's leave, they should forfeit the whole of their wages; and that after the arrival of the ship in the port of *London*, and before she was unloaded, the plaintiff was absent from her, without leave, a day and a night.

These facts were proved; but it further appeared, that when the plaintiff returned to the ship, the defendant again took him into his service, and that he worked in discharging the ship like the other men.

Lord ELLENBOROUGH.—I am of opinion that the forfeiture was waived. The defendant might have refused to receive the plaintiff again, or insisting on the forfeiture

forfeiture, might have entered into a freſh agreement with him; but by permitting the plaintiff to return and to work in the diſcharge of the cargo, he muſt be taken to have pardoned the offence which had been committed, and he cannot afterwards revert to the forfeiture. The plaintiff is therefore entitled to his wages at the ſtipulated rate, as if there had been no infraction of the articles.

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Verdict accordingly.

Topping and *Eſpinaſſe* for the plaintiff.

Park and *Nolan* for the defendant.

[Attornies, *Ruppingham* and *Jones*.]

FARRANCE *v.* ELKINGTON.

Wedneſday, February 27.

THIS was an action on 11 Geo. 2. c. 19. for double rent.

If tenant from year to year give his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable to an action on 11 Geo. 2. c. 19. for double rent.

The firſt count of the declaration ſtated, that the defendant held a dwelling-houſe as tenant thereof to the plaintiff, and on the 20th February 1810 gave notice to the plaintiff of his intention to quit the ſaid dwelling-houſe *as ſoon as he could poſſibly get another ſituation*; that on the 29th of September following he did get another ſituation, and ought to have quitted

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the plaintiff's dwelling houſe, but that he remained in poſſeſſion of it till the 25th of March 1810; whereby he became liable to pay £108, being double the yearly rent for the time he ſo held over after the expiration of the notice to quit.

The declaration being opened,—

Lord ELLENBOROUGH expreſſed himſelf of opinion that the notice to quit was too vague, and that this caſe did not come within the ſtatute.

Garrow and *Campbell*, for the plaintiff, brought to his Lordſhip's notice the words of the ſtatute, which are, "that if any tenant ſhall give notice of his intention to quit the premiſes holden by him *at a time mentioned in ſuch notice*, and ſhall not deliver up the poſſeſſion thereof accordingly, then ſuch tenant ſhall thenceforward pay to the landlord double the rent which he ſhould otherwiſe have paid." The time mentioned in this notice was, — as ſoon as the tenant could get another ſituation. When he got another ſituation, the time was aſcertained. *Id certum eſt quod certum reddi poteſt.*

Lord ELLENBOROUGH.—I am clearly of opinion that the notice is not within the ſtatute. It only amounts to this, that the defendant would quit when he found it convenient. There muſt be ſome fixed time mentioned before the double rent can attach. Would the landlord have been bound by this notice? Could

Could he let the houſe to another tenant on the contingency of the defendant's getting a ſituation to ſuit him. This attempt to recover double rent under the preſent circumſtances is an experiment which had better have been avoided (*a*).

There being other accounts for uſe and occupation, and for not uſing the premiſes in a tenantable manner, the cauſe was referred.

Garrow and *Campbell* for the plaintiff.

Park and *Eſpinaſſe* for the defendant.

[Attornies, *Arrowſmith* and *Rhodes*.]

(*a*) The facts of the caſe were, that the defendant held the houſe in queſtion at a rent greatly under its value; that he gave a notice in writing, to the purpoſe ſtated in the declaration; that on the 29th of September, he himſelf removed to another houſe which he purchaſed; and that he underlet the plaintiff's at a conſiderable premium.

There is no neceſſity for a notice under this act of parliament to be in writing, at leaſt where the tenant holds under a parol demiſe. Timmins v. Rowlinſon, 3 Burr. 1603.

Thurſday, February 28.

BROWN *v.* PIGEON.

An action cannot be maintained for a malicious arreſt by A. againſt B. if A. owed B. the ſum for which he was held to bail, although B. was indebted to A. to a larger amount.

THIS was an action for a malicious arreſt.

Pigeon owed *Brown* £23. *Brown* owed *Pigeon* £10.—*Brown*, meaning to allow the latter ſum by way of ſet-off, arreſted *Pigeon* for the balance of £13. Immediately after, *Pigeon* arreſted *Brown* for £10, which was the act now complained of. *Pigeon* took out a ſummons to ſtay proceedings in the action againſt him, and offered to pay £23. *Brown* refuſed to take more than £13. A judge finally ordered proceedings to be ſtayed in the action againſt *Pigeon*, on payment of £13 and coſts, and in that againſt *Brown*, onpayment of £10, without coſts.

Park, for the plaintiff, contended, that when he was arreſted, he was not indebted in any ſum of money whatever to *Pigeon*, who on the contrary, by his own confeſſion, owed him £13. It is only the ſum due upon ſtriking a balance, that can be conſidered the ſum due from one party to another. The defendant had, therefore, held the plaintiff to bail maliciouſly, and without any probable cauſe.

Lord ELLENBOROUGH.—The defendant's conduct in this tranſaction was highly vexatious and reprehenſible; but this action cannot be maintained. He

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He had not only a probable, but a real cauſe of action againſt the plaintiff at the time of the arreſt. The croſs demands were ſeparate and diſtinct. The ſtatute of ſet-off is not compulſory. The defendant was not obliged to ſet off the debt due to him from the plaintiff, and the plaintiff, although he held the defendant to bail only for £13, might have recovered the £23. The defendant's harraſſing proceeding was a fit ſubject for a ſummary application to a judge, which has been effectually made; but when a debt of £10 was due to him, he is clearly not liable to an action for maliciouſly holding the plaintiff to bail without any reaſonable or probable cauſe.

A juror was withdrawn.

Park and *Eſpinaſſe* for the plaintiff.

Garrow and *Barrow* for the defendant.

[Attornies, *Tilly* and *Godmond*.]

Vide Tid. Prac. 153. Dr. Turlington's caſe, 4 Burr 1996.

REYNOLDS

Friday, March 1.

REYNOLDS v. CHETTLE.

If a bill of exchange is accepted, "payable *at Meſſrs. A. B. & Co.*'s" who are bankers in the city of London, a preſentment of the bill for payment to their clerks, at the *Clearing Houſe* is ſufficient.

THIS was an action by the indorſee, againſt the acceptor of a bill of exchange, accepted, *payable at* Meſſrs. *Harriſon & Co.*'s.

Theſe gentlemen carry on their buſineſs of bankers at *No.* 1, *Manſion Houſe Street*, in the city of London. The bill, when due, was preſented at the *Clearing Houſe* (*a*) in the city, to the clerks of Meſſrs. *Harriſon & Co.*, who ſaid, it would not be paid.

Garrow, for the defendant, inſiſted, that according to the late deciſion in C. P. (*b*), the plaintiff was bound to ſhew, that the bill was preſented at the banking houſe of Meſſrs. *Harriſon & Co.* in *Manſion Houſe Street.*

Lord ELLENBOROUGH.—I think a preſentment to the banker's clerks in the *Clearing Houſe*, was a preſentment *at* Meſſrs. *Harriſon & Co.*'s within the meaning of the acceptance.

In an action on a bill of exchange, the plaintiff cannot be compelled to prove what conſideration he gave for it, by a mere notice that he will be required ſo to do.

The defendant had given the plaintiff notice, to prove what conſideration he gave for the bill; which, it was ſubmitted, he was bound to prove accordingly.

(*a*) *Vide* Fernandey v. Glynn, 1 Camp. 426. (*b*) Callaghan v. Aylett, *ante* 550.

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Lord ELLENBOROUGH.—The notice is insufficient to throw this burthen on the plaintiff. You must first cast some suspicion upon his title, by shewing that the bill was obtained from the defendant, or some previous holder, by force or by fraud.

The plaintiff had a verdict.

Gaselee for the plaintiff.

Garrow for the defendant.

[Attornies, *Weston* and *Minshull*.]

Vide Rees v. Marquis of Head-fort, *ante*, 574.

LANYON v. BLANCHARD.

Friday, March 1.

If an agent, employed to effect an insurance on goods, represents himself as the owner of the goods to another person whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent.

THIS was an action to recover the amount of a loss received by the defendant, upon a policy of insurance which he had effected as a broker.

The plaintiff being at *Monte Video*, wrote to one *Crowgy* at *Falmouth*, inclosing an unindorsed bill of lading, of certain tallow, deliverable to the shipper's order, and directing him to effect an insurance on the tallow, and to employ a good house at *Liverpool* to sell

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fell it, for the plaintiff's benefit. *Crowgy* came to *London*, employed the defendant to effect the insurance, represented that he had authority to indorse the bill of lading, and actually did indorse it accordingly, to a person at *Liverpool* named by the defendant. The defendant effected the policy. The ship was lost, and he received the sum insured from the underwriters. This he claimed to retain, to satisfy a balance due to him from *Crowgy*.

Garrow, for the defendant, contended, that he had a general lien upon the policy before the loss, and upon the money received since, as between himself and the person by whom he was employed. *Crowgy* represented himself in this transaction not as an agent, but as a principal. He appeared to have authority to indorse the bill of lading, and the defendant had no means of knowing, that the tallow was to be sold for the account and benefit of the plaintiff. The former cases upon this subject had turned upon, whether a principal was discloſed, or the person employing the broker appeared as principal himself. Here *Crowgy* assumed dominion over the bill of lading, and the defendant had reason to believe, that the policy was effected for his benefit.—But—

Lord ELLENBOROUGH was of opinion, that in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent, must run

run the risk of their being true or false; and that as *Crowgy* had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person, for whose ultimate benefit it was effected.

Verdict for the amount of the loss, subject to a deduction for the premiums and other charges due on this particular policy.

Park, *Jervis* and *Richardson*, for the plaintiff.

Garrow for the defendant.

Vide Maans v. Henderson, 1 East, 335. Snook v. Davidson, *ante* 218.

ACKLAND *v.* PEARCE.

Saturday, March 2.

Coram Le Blanc, J. (*a*).

A bill of exchange is void in the hands of a bonâ fide indorsee, if it was drawn in consequence of an usurious agreement for discounting it, although the drawer, to whose order it was payable, was not privy to this agreement.

THIS was an action on a bill of exchange for £386, dated 15 May, 1810, acccepted by *J. Wain*, drawn by the defendant, payable to his own order 10 days after date, and indorsed by him to the plaintiff.

(*a*) Lord ELLENBOROUGH C. J. was this day at Windsor attending the Queen's counc

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Defence,—uſury in the formation of the bill.

J. Wain, the acceptor, ſwore, that being much preſſed for the ſum of £250, he applied to one *White* to diſcount a bill for that amount. *White* refuſed, as the bill had too long to run, but offered if he could get *Pearce*, the defendant, to draw a bill to be accepted by him at 10 days, for £386, to give him £250 in caſh, and a returned bill of another perſon for £136, on condition that he, *White*, ſhould receive for this accommodation the ſum of £10. The bill in queſtion was accordingly, at *Wain*'s ſolicitation, drawn and indorſed by the defendant, who was not made acquainted with the agreement. *Wain* having accepted the bill, carried it to *White*, received from him a cheque for £250, but not the bill for £136, or any thing more, and paid him the ſtipulated ſum of £10.

Topping, for the plaintiff, contended, that this was not uſury which would defeat this action, as the agreement was not between the parties to the bill. The defendant was entirely ignorant of the manner in which the bill was to be diſcounted, and its character could not be determined by what took place between the acceptor and third perſons. The uſury was in the diſcounting of the bill, and not in its formation. It was therefore valid in the hands of a *bonâ fide* indorſee for value.

Le Blanc, *J.* I am clearly of opinion, that if *Wain* is believed, this action cannot be maintained. The bill was drawn under an uſurious agreement. The drawer's

drawer's ignorance of this agreement is immaterial. Had the bill been in exiſtence before the agreement, the uſury between *Wain* and *White* would not have vitiated it in the hands of the plaintiff; but the agreement was the cauſe of its formation. If a bill of exchange muſt be valid, becauſe the parties to it cannot be proved to have had notice of the occaſion for drawing it and the purpoſes to which it is to be applied, this would be an eaſy recipe for evading the ſtatutes of uſury.

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The jury, however, diſbelieved *Wain*, and found for the plaintiff.

The witneſs called to prove notice of the diſhonour of the bill ſaid, that on the day it became due he left a written notice of its having been diſhonoured at the defendant's houſe.

Secondary evidence may be given of a written notice of the diſhonour of a bill of exchgane, without notice to produce it.

LE BLANC, J. after argument, ruled, that ſecondary evidence of the contents of this notice, might be given, without a notice to produce it, and compared it to a notice to quit (*a*).

Topping and *Copley* for the plaintiff.

Garrow and *Park* for the defendant (*b*).

[Attornies, *Anneſly* and *Stevens*.]

(*a*) *Vide* Philipſon *v.* Chaſe, *ante* 110.

(*b*) In the enſuing term a motion was made to ſet aſide the verdict in this caſe as contrary to evidence; but the Judge's ruling at *niſi prius* was not queſtioned.

Saturday, March 2.

LINDO *v.* UNSWORTH.

The holder of a bill of exchange is excuſed for not giving notice of its diſhonour in the uſual time, by the day on which he ſhould regularly have given the notice being a public feſtival during which he is ſtrictly forbidden by his religion to attend to any ſecular affairs.

THIS was an action by the indorſee againſt the drawer of a bill of exchange, which became due, and was diſhonoured on Saturday the 6th day of October laſt.

It was then in the hands of *Meſſrs Hoare & Co.*, the plaintiff's bankers. They, in the uſual way, gave it to a notary, who returned it to them noted, on the morning of Monday the 8th. The ſame day, the bankers ſent to give notice of the diſhonour of the bill to the plaintiff; but he being by religion a *Jew*, and this, as the witneſſes ſtated, being of all celebrated throughout the year, the greateſt Jewiſh feſtival, during which it is unlawful for perſons of that perſuaſion to attend to any ſort of buſineſs, the plaintiff's counting houſe was ſhut, and there was no way to communicate notice to him of the diſhonour of the bill till after the poſt had been diſpatched. On the 9th he ſent off a letter by the poſt, giving notice of the diſhonour of the bill, addreſſed to the defendant at Lancaſter.

Park, contended, on the authority of *Scott* v. *Lifford*, 1 *Campb.* 246, and *Smith* v. *Mullett*, *ante* 208, that the notice on the 9th was ſufficient.

Topping, *contrà*, obſerved, that in theſe caſes the parties all lived cloſe to each other; that it was more important

important a notice ſhould be given early which had to travel to a diſtance; and that the plaintiff was here bound to have ſent off a letter containing notice, by the poſt of the 8th.

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Lord ELLENBOROUGH.—I think the plaintiff was excuſed from giving notice on the 8th, upon the ſcore of his religion. The law required him to give notice with reaſonable diligence, and I think he did ſo if he ſent off the letter as ſoon as he could after the termination of the feſtival, during which he was abſolutely forbid to attend to ſecular affairs. The law merchant reſpects the religion of different people. For this reaſon, we are not obliged to give notice of the diſhonour of a bill on our Sunday. But it was equally impoſſible for the defendant to give this notice on the 8th of October. The letter ſent off on the 9th is therefore ſufficient.

Verdict for the plaintiff.

Park and *Marryat* for the plaintiff.

Topping and *Richardſon* for the defendant.

[Attorneys, *Swain* and *Blackſtock*.]

Stat. 39 & 40 Geo. 3. c. 42., "for the better obſervance of Good Friday," enacts, that with reſpect to bills of exchange and promiſſory notes, *Good Friday* ſhall be conſidered like a Sunday or Chriſtmas day; but this ſeems to have been ſo at common law and by the cuſtom of merchants. *Vide* Taſſel *v.* Lewis, 1 Ld. Raym. 743.

Tuesday March 5.

HEYS v. HESELTINE and Another.

An averment in a declaration that A. B. & Co. accepted a bill of exchange according to the uſage and cuſtom of merchants, is ſupported by evidence that the bill was accepted by C. D., their authorized agent, thus: "*For A. B. & Co. C. D.*"

ACTION againſt the acceptors of a bill of exchange.

The declaration alleged generally, that the defendants accepted the bill according to the uſage and cuſtom of merchants.

The bill was in fact accepted by an authorized agent of the defendants, in the following form: "*For Heſeltine & Co., John Wilſon.*"

Park objected that this was a variance, and that the declaration ſhould have averred that the defendants accepted the bill "*by one John Wilſon, their agent in that behalf.*"

Lord ELLENBOROUGH.—If the defendants accepted the bill by an agent, in contemplation of law, they accepted it themſelves; and it is a general rule in pleading, that facts may be ſtated according to their legal effect. I think the evidence in this inſtance ſupports the declaration.

The defendants had a verdict on the merits.

Garrow, *Topping* and *Campbell* for the plaintiff.

Park

Park and Abbott for the defendants.

[Attornies, *Hurd* and *Welch*.]

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Vide Helmſley *v.* Loader, *ante* 450, and the caſes there referred to.

EYRE *v.* PALSGRAVE.

Tueſday, March 5.

When a ſhip inſured is captured in a voyage to an enemy's country, and the Britiſh licence legalizing the voyage is loſt, to ſhew that ſhe had ſuch a licence, it is neceſſary to prove the loſs of the paper purporting to be a licence put on board the ſhip, and to produce examined copies of the order in council for granting the licence, and of the copy of the licence preſerved in the ſecretary of ſtate's office.

ACTION on a policy of inſurance from *Riga* to *Hull*, dated 7th Auguſt 1810. The ſhip was captured in the *Belt*, on her way home, by a Daniſh privateer.

The following was the only evidence adduced, to ſhew that there had been a licence to legalize the voyage.

The captain, who is a foreigner, ſtated, that when the privateer was approaching, he ſunk (amongſt other documents) a paper which he underſtood to be a *Britiſh* licence, and which he had received in *London* from Mr. *La Marche*.

This gentleman being called, ſaid, he had read over the paper given by him to the captain, and believed it to be a regular licence for the voyage in queſtion. However, he had not procured it from the

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secretary of state himself, but had received it from a Mr. *Eames*, of the house of *Eames, Muller & Co.*

Park, for the plaintiff, contended, that the licence being lost, this was secondary evidence of its contents to go to the jury.

The *Attorney General, contrà*, insisted, that the order in council should be produced, authorizing the secretary of state to grant the licence, and the copy of the licence preserved in the secretary of state's office. At common law, a licence to trade with the enemy could only be granted under the great seal. By 48 *Geo.* 3, *c.* 126, upon an order in council being made for that purpose, the secretary of state was authorized to grant these licences. But the order in council must be proved, to shew the validity of the licence.

Lord ELLENBOROUGH.—If the objection is taken, I must decide that this evidence is insufficient. At present, we have no proof of a licence having ever issued. All we know is, that *La Marche* delivered a paper to the captain, which he had received as a licence from another individual. I hope, that for the future, attornies in cases of this sort will come prepared with the proper evidence to shew the voyage to be legal. I do not require the production of the council books. On the contrary, it may be dangerous to remove them from the office where they are deposited; and I shall hold it quite sufficient to produce an examined copy of the order relied upon. For the same reason, it is unnecessary to produce the licence preserved in the secretary

cretary of ſtate's office. Let the plaintiff prove that the licence put on board the ſhip is loſt, and produce examined copies of the order in council and of the licence in the ſecretary of ſtate's office. I truſt that all concerned will take notice of the rule now laid down. The preſent plaintiff muſt be

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Nonſuited.

Park and *Scarlett* for the plaintiff.

The *Attorney General* and *Marryat* for the defendant.

[Attornies *Reſſer* and *Bourdillon*.]

Vide Kenſington v. Inglis, 8 Eaſt 273. Rhind v. Wilkinſon, 2 Taunt. 237.

SMEDLEY q. t. v. ROBERTS and Another.

Thurſday, March 7.

DEBT for penalties on the ſtatute of uſury.

Semble, that lending money on *continuation* is uſurious.

The tranſaction alleged to be uſurious took place between the defendants and one *Pidding*, and was ſworn by him to have been as follows:

On the 13th of December, *Pidding* owed the defendants, who are ſtock brokers, £8237. 10*s*. and they propoſed to him to continue the loan of this money

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till the 10th of January following, on his pledging £10,000 omnium with them, on which they were to advance an inſtalment of £1000 on the 15th of December, and which they were to return on the 10th of January, at 3-8ths higher than the price on the 13th of December. He agreed to the propoſal, and it was carried into effect. He accordingly, on the 10th of January, upon receiving back his ſcrip receipts for the £10,000 omnium, gave them a cheque for £9275, which was duly paid. This *total* was compoſed of £8237. 10*s*. the original debt; the £1,000 inſtalment; and £37. 10*s*. for the 3-8ths;—which laſt ſum is more than at the rate of £5 per cent per annum for the money forborne.—The credit of the witneſs was conſiderably ſhaken in croſs examination, particularly by the account he gave of the manner in which this action had been commenced.—No very ſatisfactory explanation could be obtained of the nature and conſequences of the contract between the parties, when money is thus lent on continuation.

Lord ELLENBOROUGH ſaid, that as far as could be diſcerned from the evidence before the court, there appeared to be no contingency in the tranſaction, and whether the market riſes or falls, the lender muſt recover his principal, together with the advance upon the price of the omnium. If ſo, where that advance is above the legal rate of intereſt, the tranſaction is undoubtedly uſurious; and in this caſe, if the witneſs was believed, there muſt be a verdict for the plaintiff. But his lordſhip pointed out the improbability of ſeveral

veral parts of *Pidding*'s teſtimony, and chiefly left it to the jury, upon the credit which he deſerved.

The jury immediately found for the defendants.

The *Attorney General*, *Garrow* and *Comyn* for the plaintiff.

Park, *Marryat* and *Gurney* for the defendant.

But the loan of money produced by the ſale of ſtock, on an agreement that the borrower ſhall replace this ſtock on a certain day, or repay the money on a ſubſequent day, with ſuch intereſt in the mean time as the ſtock itſelf would have produced, is not uſurious, though the intereſt exceed *5l. per cent.* Tate *v.* Wellings, 3 T. R. 551. So where A. owing B. ſo much money on a given day as would have purchaſed a given quantity of ſtock, B. took a bond from A., conditioned for the transfer to B. on a future day of the ſame quantity of ſtock, and for the payment in the meantime of ſuch intereſt as the ſame would have produced: this was held neither to be uſurious, nor within the ſtock-jobbing acts. Maddock *v.* Rumball, 8 Eaſt 304. *Vide etiam* Sanders *v.* Kentiſh, 8 T. R. 162. In theſe caſes, from the fall of ſtock, a loſs might have accrued to the lender.

Thurſday, March 7.

MULLER *v.* THOMPSON.

A voyage to a Pruſſian port is not illegal as being a trading with an enemy, although our commerce is entirely excluded from the ports of Pruſſia, and there be no diplomatic intercourſe between the two countries.—A policy of inſurance is not vitiated by giving leave to the ſhip to proceed to any port in a particular ſea in which there are both hoſtile and neutral ports, unleſs it can be ſhewn that it was intended the ſhip ſhould in fact proceed to one of the former.—An inſurance is declared to be "on the "cargo, *being* "1031 *bhds. wine.*" This does not amount to a warranty that the wine conſtitutes the whole cargo, and that no other goods ſhall be taken on board.

THIS was an action on a policy of inſurance, dated 17th April 1810, "at and from *Gottenburgh*, or from off Gottenburgh (if the ſhip ſhould have proceeded without entering that port) to *Konigſberg*, with leave to carry ſimulated papers, to ſeek, join and exchange convoys, and to proceed to any port or ports in the *Baltic* or *Gulph of Finland*, in the event of the ſhip not being admitted into the port of deſtination."

The inſurance was declared to be "*on the cargo, being* 1031 *hogſheads wine, valued at* £16 *per hogſhead.*"

The ſhip was *Daniſh*, and brought a cargo of wines from *Bourdeaux*. Theſe ſhe unloaded and reloaded at *Chatham*. The captain likewiſe put on board there eight caſes of Britiſh manufactured goods, which, together with his Britiſh papers, he ſtowed away in the bottom of the hold. The ſhip then proceeded on her ulterior voyage, and after touching at *Gottenburgh* ſhe was captured by a French privateer, and carried into *Dantzic*. At firſt there appeared no evidence againſt her, and ſhe would have eſcaped, had not the Britiſh goods and papers been afterwards diſcovered. But by means of them ſhe was condemned with her whole cargo.

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Garrow, for the underwriters, first objected that the voyage was illegal, as our ships are excluded from *Konigsberg*, which must therefore be considered an enemy's port.

Lord ELLENBOROUGH.—We are treated very discourteously there, but it is not to be considered an enemy's port. *Konigsberg* belongs to *Prussia*. We are placed in a strange anomolous situation with regard to that country and others on the continent; but it is not that of war. We have published no declaration of war against *Prussia*; we have not issued letters of marque and reprisals; we have not done any act of hostility. Therefore, though the relations of amity are not very strong between us, yet we are not at war with Prussia, and a voyage from England to a Prussian port is not illegal.

Garrow then objected, that there being various ports in the Baltic and Gulph of Finland, which at that time were decidedly hostile to this country, a policy, giving leave to proceed to any of these, was illegal on the face of it.

Lord ELLENBOROUGH.—You must shew that the parties had it in contemplation, that the ship should proceed to an enemy's port in the Baltic or Gulph of Finland. There being neutral ports within these limits, I will presume that the leave was meant to apply to such only, till the contrary is proved (*a*).

(*a*) *Vide* Barker v. Blakes, 9 East 283.

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Garrow, laſtly inſiſted, that the underwriters were diſcharged by the 8 caſes of Britiſh manufactured goods, taken on board at *Chatham*. The inſurance was declared to be "on the cargo, *being* 1031 *hogſheads wine.*" This amounted to a warranty, that the whole cargo conſiſted of wine, and that no other goods ſhould be taken on board.

Lord ELLENBOROUGH.—I think the *cargo* does not mean the *whole cargo*, but merely that the inſurance ſhall attach upon that part of the cargo which conſiſts of the 1031 hogſheads of wine. There was no warranty or repreſentation that this was French wine. The riſk was not increaſed by other goods being put on board. The ſhip was not declared to be of any particular nation. There was nothing illegal in ſending Britiſh goods to a Pruſſian port, and I do not think it was any contravention of the terms of the policy.

Verdict for the plaintiff.

In the enſuing term, *Garrow* applied to ſet aſide the verdict, on the ground of there being a warranty that the cargo ſhould conſiſt of nothing beſides wines. But the Court refuſed a rule to ſhew cauſe.

The *Attorney General*, *Park* and *Holroyd* for the plaintiff.

Garrow, *Topping* and *Scarlett* for the defendant.

[Attornies, *Gattye* and *Blunt*.]

JARMAN *v* COAPE.

Friday, March 8.

If by a policy of insurance the ship is warranted "free of capture, and seizure in her port or ports of discharge," and she is taken in an open river not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge within the meaning of the policy, and the underwriters are not liable for the loss.

THIS was an action on a policy of insurance, "at and from London to any port or ports, place or places of discharge, all or any, on the continent, with liberty to touch at Heligoland, and during any time she might stay there, and with leave to carry simulated papers and a British licence, *free of capture and seizure in her port or ports of discharge.*"

The ship having touched at *Heligoland*, there took in a supercargo and proceeded to the river *Jade*. When she had entered the river and come to a place called *Hockzee*, the supercargo went on shore, for the purpose of going to *Varrel*, a town higher up the river, to announce her arrival to the correspondent of the shipper there, who had authority to give orders where the goods should be landed. He did not himself return to the ship, but sent a messenger to *Hockzee*, —with what orders did not appear. The ship in the mean time had moved higher up the river; and when she was about 15 English miles from *Varrel*, where the river is between two and three miles broad, she was seized by the *Douanniers* from that port, and being carried in there, she was afterwards condemned. Ships trading to *Varrel*, in the ordinary course of things, never unload where the ship in question lay when she was seized. If large, they proceed to a creek near *Eckwarden*, called *Varrel Roads*; if

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if ſmall, they enter a baſon near the town called the *Varrel Zeel*. It was ſuggeſted, however, although no direct proof was offered one way or the other, that ſince the French douanniers have been eſtabliſhed at *Varrel*, it has been uſual for ſhips from *London* not to enter the *Roads* or the *Zeel*, but on a private ſignal being given, to diſcharge their cargoes into lighters in the *Jade*, or in ſluices by the ſide of the river.

The *Attorney General*, for the plaintiff, contended, that as the ſhip, when ſhe was ſeized, was not within the port of *Varrel*, nor in any other port, the loſs did not come within the warranty; and he relied upon *Baring* v. *Vaux*, *ante* 541, where his Lordſhip had put it to the jury to ſay, in what port the ſhip lay when ſhe was taken at anchor off *Goree*.

Lord ELLENBOROUGH.—To diſcharge the underwriters from their liability, the ſhip, when ſhe was taken, muſt have been in ſome port within the meaning of the warranty. The words of the warranty here are, not free of capture or ſeizure *in any port* generally, as in *Baring* v. *Vaux*; but, "free of capture or ſeizure *in her port or ports of diſcharge*." If, when ſhe was ſeized by the *douanniers*, it was her intention to unload her cargo on the adjacent banks of the *Jade* the firſt favourable opportunity, I think ſhe may be conſidered as within the limits of her port of diſcharge, although ſhips, when no danger is apprehended, do not uſually unload there. It muſt have been in the contemplation of both the contracting parties, that the goods were more likely to be landed in a clandeſtine manner

than in a public harbour, and a ſeizure of this ſort ſeems to be exactly the riſk againſt which the underwriters meant to guard themſelves.

The jury, without heſitation, found for the defendant.

In the enſuing term, the *Attorney General*, applied for a new trial, on the ground that the ſhip, when ſhe was taken, could not be conſidered in her port of diſcharge; but the Court thought, that this was a matter of fact which had been properly left to the jury, who had come to a right concluſion.

Rule to ſhew cauſe refuſed.

The *Attorney General* and *Marryat* for the plaintiff.

Park and *Scarlett* for the defendant.

[Attornies *Dawes* and *Blunt*.]

Vide Brown v. Tierney, 1 Taunt. 517.

Friday, March 1.

MOORSOM *v.* BELL.

If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to shew, that this would be more or less than a fair compensation for the detention.

THIS was an action of covenant upon a charter-party, for detaining a ship beyond the stipulated time of demurrage.

By the charter-party, 50 lay days were allowed for loading and unloading, &c. and the freighter was at liberty to keep her ten days more upon demurrage, at eight guineas a day. In fact, she was kept in the London docks 65 days beyond the ten, before she was unloaded. The plaintiff claimed a compensation for this extended time, at the rate of eight guineas a day. The defendant paid money into Court at the rate of £4 a day.

The plaintiff's crew consisted of 12 persons. Of these he discharged nine on entering the docks, and while the ship was detained, he had only to support the others and four custom-house officers.

Lord ELLENBOROUGH.—If a ship is detained beyond her days of demurrage, *prima facie* the sum allowed as demurrage shall be taken as the measure of compensation. This is a rule both of convenience and of justice. But it is open to the ship owner to shew, that more damage has been sustained, and to the freighter to shew, there has been less than would thus be compensated. In this case, no more than the stipulated

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pulated allowance for the demurrage days is claimed by the owner, and the jury will say whether he is entitled to so much.

The jury found for the plaintiff at the rate of £7 a day.

The *Attorney General*, *Garrow* and *Richardson* for the plaintiff.

Park and *Taddy* for the defendant.

[Attornies, *Williams* and *Palmer*]

Vide Randal v. Lynch, *ante* 356.

NEWSOME *v.* WILLIAM COLES, GEORGE COLES, and CHARLES COLES.

Saturday, March 9.

THIS was an action against the three defendants as acceptors of a bill of exchange, in the following form:—

If after a dissolution of partnership, and notice of this published in the London Gazette, and sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership.

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" London, 20th March, 1810.

" £2830. 16s.

" Four months after date pay to my order two " thouſand eight hundred and thirty pounds ſixteen " ſhillings, value received.

" H. Vos.

" Meſſrs. Thos. Coles & Sons,
" London.

(Indorſed) " H. Vos.

" Accepted, Thos. Coles & Sons,
" At Meſſrs. Brickwoods & Co."

Thomas Coles and his three ſons, the preſent defendants, formerly carried on buſineſs in partnerſhip together, under the firm of " *Thomas Coles & Sons.*" The father died in 1805, and the three ſons continued to carry on buſineſs under the ſame firm, till the year 1808. *George* and *Charles* then withdrew, and eſtabliſhed a new buſineſs under a new firm. Notice of the diſſolution of partnerſhip was publiſhed in the London Gazette, and was ſent round to the correſpondents of the houſe. *William Coles* continued the old buſineſs by himſelf, under the old firm, and accepted the bill in queſtion, drawn upon *Meſſrs. Thomas Coles & Sons.* The plaintiff had not had any dealings with the partnerſhip of " Thomas Coles & Sons," when compoſed of the three brothers; and when he took the bill in queſtion, he did not know that that partnerſhip had been diſſolved.

The

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The *Attorney General* having opened theſe facts as counſel for the plaintiff, contended that *George* and *Charles Coles* were liable to him as partners with their brother *William*. They muſt be taken to have authorized him ſtill to hold them out as partners to the world. If they conſented to the old firm being uſed by him, they were clearly liable as much as if the names of both had been mentioned by their authority and their conſent muſt be preſumed from their never having attempted to prevent him from uſing the old firm. Had they applied to the great ſeal, as it was their duty to do, the Chancellor would at once have granted an injunction againſt one partner drawing or accepting bills in the partnerſhip firm after a diſſolution of the partnerſhip.

Lord ELLENBOROUGH. — It is not pretended that the defendants *George* or *Charles Coles* ever interfered with the buſineſs carried on by *William* after the diſſolution of the partnerſhip, or by any act whatſoever authorized him to uſe the firm under which they had traded together. I am therefore of opinion that they are not liable for that firm being uſed by him without their authority. Ample notice had been given of the diſſolution of the partnerſhip; and after that, it was the duty of perſons taking ſecurities in the name of *Thomas Coles & Sons*, to enquire who were deſignated by that firm. The plantiff might not know of the diſſolution, but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not bound to apply to the Lord Chancellor for an injunction, or

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to take any notice of the firm which their brothers might happen to uſe. They were diſcharged from all liability for his acts by the diſſolution of the partnerſhip, and the notice which was communicated of that event. The plaintiff muſt be called.

The *Attorney General*, *Onſlow*, Serjeant, and *Comyn* for the plaintiff.

Garrow, *Park* and *Cowley* for the defendants.

It has been held, that notice of the diſſolution of partnerſhip, publiſhed in the Gazette, is ſufficient as to all who had no dealings with the partnerſhip, Godfrey *v.* Turnbull, 1 Eſp. N.P.C. 371.; although the partners remain liable for the acts of each other, to thoſe who had been correſpondents or cuſtomers of the houſe, till the latter have received a particular notice of the diſſolution of partnerſhip. Graham *v.* Hope, Peak. Caſ. 154. Gorham *v.* Thompſon, *Ib.* 42.

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ARCANGELO *v.* THOMPSON.

A count on a policy of inſurance laying the loſs by *capture*, is ſuſtained by evidence, that the ſhip was captured by a privateer; although this happened from a colluſion between the maſter of the ſhip and the commander of the privateer, and the plaintiff might have recovered under a count laying the loſs by the *barratry* of the maſter.

ACTION on a policy of inſurance, dated in the year 1797, on goods by a ſhip *warranted Daniſh*, at and from Trieſte to Hamburgh.

To prove a warranty, that a ſhip inſured was of a particular nation, it is *primâ facie* evidence, that ſhe carried the flag of that nation at times when ſhe was free from all danger of capture, and that the captain addreſſed himſelf to the conſul of that nation in a foreign port.

The production of a letter dated abroad, and addreſſed to J. S. in England, with the Engliſh ſhip-letter poſt-mark upon it, which directed a policy to be effected, is ſufficient to prove that J. S. was "the perſon reſiding in Great Britain, who received the order for and effected ſuch policy."

The

The loſs was laid by *capture*.

The ſhip was captured by a French privateer, carried into *Venice*, and there condemned together with her cargo. This appeared to have happened through an agreement between the captain of the ſhip and the captain of the privateer.

Beſt, Serjeant, for the defendant, objected, that the loſs was not proved as laid, and had not ariſen from an hoſtile capture, but from the barratry of the maſter.

Lord ELLENBOROUGH.—The plaintiff was no party to the barratrous agreement under which the ſhip was taken. As to him, the loſs actually aroſe from the capture. He might have recovered under a count laying the loſs by barratry; but as the ſhip was actually taken by a French privateer, I think this declaration, laying the loſs by capture, is ſuſtained by the evidence (*a*).

To prove the ſhip to be a *Dane* the evidence was, that the captain when at *Trieſte* addreſſed himſelf to the *Daniſh* conſul there; that when he left that port he carried *Daniſh* colours, and that when he was brought into Venice, he had ſtill the ſame colours with the French flag flying over them.

(*a*) *Vide* Heyman v. Pariſh, *ante*, 149.

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Beſt, Serjeant, contended that the acts of the captain were no evidence to ſhew to what country the ſhip belonged. He might have various reaſons for paſſing as a *Dane*, although he belonged to one of the belligerent powers. Therefore, ſome documents ſhould be produced, or ſome witneſs called to prove that the warranty had been complied with.

Lord ELLENBOROUGH.—I think the acts of the captain are *primâ facie* evidence for the owner of the goods, to ſhew to what nation the ſhip belonged. The circumſtance of the ſhip carrying *Daniſh* colours when ſhe was captured, would have very little weight, as in the moment of danger any ſtrange flag might be hoiſted for the purpoſe of deception; but from the captain having carried *Daniſh* colours when he failed ſecurely from the port of *Trieſte*, and having there addreſſed himſelf to the *Daniſh* conſul, and conducted himſelf as the maſter of a *Daniſh* ſhip would have done, I conceive there is fair ground for the jury to infer that the ſhip really was *Daniſh*, according to the warranty.

The policy was in the name of *S. Levy*, who was averred by the declaration to have been "the perſon reſiding in Great Britain, who received the order for and effected ſuch policy (*a*)."

To prove the *order*, the plaintiff's counſel gave in evidence a letter from him, dated at *Trieſte*, addreſſed

(*a*) Stat. 28 G. 3. c. 56.

to

to *Levy* in *London*, and having upon it the Engliſh ſhip-letter poſt-mark, with the date of 1797.

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Lord ELLENBOROUGH held, after argument, that this was ſufficient evidence of the receipt of the order by *Levy*, before the effecting of the policy.

And the plaintiff had a verdict (*a*).

The *Attorney General*, *Garrow* and *Marryat* for the plaintiff.

Beſt, Serjeant, and *Carr* for the defendant.

(*a*) But in a criminal caſe, the poſt-mark upon a letter does not ſeem to be evidence to prove where or when a letter was put into the poſt office. Rex v. Watſon, 1 Camp. 215.

WILSON v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Saturday, March 9.

THIS was an action on a policy of inſurance, at and from London to Liſbon, on wheat.

The *Royal Exchange Aſſurance Company* is liable for *a total loſs* upon a cargo of corn, where the ſhip from the perils inſured againſt, becomes incapable of purſuing the voyage, and another veſſel cannot be procured to forward the corn to its port of deſtination.

The policy contained the uſual warranty, "from all average on corn, unleſs general."

The facts opened were, that when the ſhip was weighing anchor to proceed with a convoy from the *Downs*, another veſſel ran foul of her, carried away her

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her bowſprit, and damaged her hull. She was in conſequence obliged to go into *Dover*, and in entering that harbour ſhe received farther damage by ſtriking on the bar. A ſurvey being made, it was found that ſhe was quite unfit to continue the voyage, and that ſhe could not be repaired without an expence much greater than her entire value. The cargo being inſpected, was found conſiderably injured from the water in her hold. The whole, conſiſting of 1160 quarters, was landed in a few days. Of theſe 400 quarters only were dry, 700 quarters were wetted, but were kiln-dried, and the reſidue was entirely ſpoiled. No other ſhip could be found to carry the wheat on to *Liſbon*, and the aſſured gave regular notice of abandonment.

The *Attorney General* argued, that under theſe circumſtances the plaintiff was entitled to recover as for a total loſs, the voyage being loſt. And he relied upon the caſe of *Manning* v. *Newnham*, of which he read the ſubjoined note taken by himſelf (*a*).

Where a ſhip is obliged to put back, and the damage ſhe has ſuſtained is of ſuch a nature that ſhe cannot purſue her voyage, and other ſhips cannnot be procured to take the cargo, this is a *total loſs* of ſhip, cargo and freight, however inconſiderable the damage ſuſtained may be, becauſe the voyage in contemplation is off.

Lord

(*a*) Manning v. Newnham. Trin. 1782.

Action on a policy.

Q. Whether an average or a total loſs?

The jury found it *total*.

It appeared that the ſhip, a Dutch prize, laden with ſugar at Surinam, ſailed from Tortola according to the warranty; ſoon received damage in a gale; was ordered back by the commander of the convoy, as the beſt thing to be done; was there ſurveyed, and declared unfit to proceed to London; and could not be repaired at Tortola, nor at St. Thomas's, which is the next place,

Lord ELLENBOROUGH.—I accede to that caſe; and if it ſhall be proved, that the voyage here was not worth purſuing, and that there were no means of purſuing

place. No ſhip could be had at Tortola to bring the whole cargo or the greater part of it. The cargo did not appear to have received any ſpecial damage, and was ſold for 700*l.* within the ſum in the policy, which was above 12,000*l.* Some ſugars might have been ſent, and there would have been many thouſand pounds profit in London. The owners purchaſed 2-3ds of the cargo, which was not yet arrived. The inſurance was warranted free from *particular* average.

Lord MANSFIELD. At the trial ſeveral prejudices ſtruck me. A jealouſy ariſes, (eſpecially in caſes of this kind, where the inſured takes particular average on himſelf) of permitting the inſured to turn an average into a total loſs.

There are three objects of the inſurance, the ſhip, the cargo, and the freight. The laſt is allowed to be a total loſs; but a queſtion ariſes upon the cargo. I left it to the Jury rather as a partial loſs. They found it total. The ſame prejudices have ſtruck me ſince the trial; but upon conſideration we all agree now that the Jury have done right. If the voyage in contemplation is loſt, or is not worth purſuing, this is a total loſs. Here the voyage in contemplation is of a large Dutch ſhip, loaded with ſugar, at Surinam, to come from Tortola to London. Much depends upon the price of the goods at the time. Here ſhe is condemned as totally unfit to proceed; and there is no ſhip to be had. Muſt the inſured wait? There is no pretence that ſhips enough to take the cargo could have been had Even what was bought is not yet arrived in England.

If the voyage were continued in another ſhip, there ought to be freight *pro ratâ*, but that is allowed to be wholly loſt. The point of the inſurance is not the ſhip alone, but her arrival in London.

We are therefore all of opinion that this is a total loſs. It agrees with all the caſes, and we

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suing it, I think this must be considered a total and not an average loss.

It appeared, however, that although the ship insured was so much shattered as to be unable to continue the voyage, there was a brig lying in *Dover* harbour at the time, in which the wheat might have been sent on to *Lisbon*; for which reason, as well as on account of some irregularity in the notice of abandonment, Lord ELLENBOROUGH was clearly of opinion, that the action could not be maintained.

A policy of insurance on *money lent to the Captain payable out of the freight*, is illegal; and the premium cannot be recovered back from the underwriters.

The plaintiff also declared upon another policy on £.300 lent to the *Captain*, payable out of the freight.—But—

Lord ELLENBOROUGH held, that this was not an insurable interest; and the policy being illegal on the face of it, that the premium could not be recovered back.

Plaintiff nonsuited.

The *Attorney General*, *Lawes* and *Taddy*, for the plaintiff.

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we are afraid much confusion will arise from too great nicety in examining what is a total loss of a voyage.

Rule for new trial discharged. *Vide* Park, 321. Marshall, 585.

Garrow

Garrow and *Boſanquet* for the defendant.

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Vide Webſter *v.* De Taſtet, 7 T. R. 157.

MOORSOM *v.* GREAVES and Others.

Tueſday, April 30.

A ſhip let to freight by the month, in attempting to enter a blockaded port by order of the freighters, is ſeized, and her cargo condemned; but being afterwards releaſed, takes in other goods and delivers them to the freighters, according to the charter-party: *Held*, that there was no ſuſpenſion of the freight during the detention of the ſhip.

THIS was an action on a charter-party, whereby the the plaintiff let the ſhip Crown to the defendants, for a voyage to any port or ports in *St. Domingo* and back to London; and the defendants were to pay the ſum of £6300 freight for the firſt 8 months, "and if ſhe ſhould take up longer in completing the ſaid voyage, then at the rate of 47*s.* 6*d.* per ton per month, for ſuch further time as ſhe ſhould be ſo employed or engaged."

The ſhip went firſt to *Port au Prince*, where ſhe unloaded a part of her outward cargo. The ſupercargo appointed by the defendants then peremptorily ordered her to *Cape Nichola Mole*. This place, being at that time occupied by *General Petion*, was blockaded by *General Chriſtophe*, and the ſhip was taken by one of his cruizers for a breach of blockade, and carried into *Port au Paix*. Here her cargo was confiſcated, and ſhe was detained between five and ſix weeks. At the end of that time ſhe was liberated, and returned to *Port au Prince*. She afterwards took in a homeward cargo, which ſhe brought to London and

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delivered to the defendants, having been out upon the adventure about 13 months.

The question was, whether the freighters were liable for the time the ship was detained at *Port au Paix?*

The *Attorney General* contended, that she could not be considered as then performing the voyage, *or employed and engaged* by the defendants.—But—

Lord ELLENBOROUGH thought, that as the ship was taken in proceeding to *Cape Nichola Mole*, by order of the supercargo, the voyage was never discontinued, and the freighters were answerable for the subsequent detention, in the same manner as if it had arisen from contrary winds or from an embargo.

The plaintiffs had a verdict for their whole demand.

Garrow, *Marryat*, and *Campbell* for the plaintiff.

The *Attorney General* and *Park* for the defendants.

[Attornies, *Nind*, and *Swain & Co.*]

Vide Havelock v. Geddes, 10 East, 555. Randall v. Lynch, *ante* 352.

COURT

COURT OF COMMON PLEAS.

SECOND SITTINGS IN TERM AT WESTMINSTER.

WARRALL *v.* CLARE.

Friday, February 8.

TRESPASS for breaking and entering the plaintiff's houſe and expelling him from the poſſeſſion thereof.

If to treſpaſs by a tenant againſt a landlord for turning him out of poſſeſſion, the defendant pleads a fact by which the leaſe was forfeited, and the plaintiff replies generally *de injuriâ*; when the fact is proved by which the leaſe was forfeited, the plaintiff cannot give in evidence a waiver of the forfeiture; but he ought to have replied this ſpecially, in avoidance of the plea.

Plea, that the defendant demiſed the houſe in queſtion to the plaintiff for a term of years, under a condition, that if the plaintiff ſhould hold an auction on the premiſes, it ſhould be lawful for the defendant to re-enter; that before the time when, &c. the plaintiff had held an auction on the premiſes; wherefore the defendant entered and expelled him, as he lawfully might, for the cauſe aforeſaid.

Replication, admitting the demiſe, *de injuriâ ſuâ propriâ abſque reſiduo cauſæ*.

The facts proved were, that the defendant had committed the treſpaſs; that the plaintiff had previouſly held an auction on the premiſes; and that between the auction

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auction and the treſpaſs, the defendant, with notice of the cauſe of forfeiture, had accepted rent from the plaintiff.

The plaintiff's counſel contended, that the iſſue muſt be found for him, as the acceptance of rent was a waiver of the forfeiture, and had the effect of entirely doing away with it, ſo that the defendant's right of entry was gone, and he was a treſpaſſer in coming upon the premiſes.—But—

Sir JAMES MANSFIELD, C. J. held, that the defendant had fully ſubſtantiated that part of his plea which was in iſſue, by proving that the auction had been held on the premiſes, and that a forfeiture had been once incurred. The acceptance of rent was a waiver of the forfeiture, and barred the defendant's right of entry; but this was matter of ſpecial replication, and could not be taken advantage of under the *de injuriâ abſque reſiduo cauſæ*, which merely put in iſſue the holding of the auction.

Plaintiff nonſuited.

Shepherd, Serjeant, and *Comyn* for the plaintiff.

Beſt, Serjeant, for the defendant.

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

Coram LAWRENCE, J.

WOLF *v.* SUMMERS.

Thurſday, February 21.

The maſter of a ſhip has a lien on the luggage of a paſſenger for his paſſage money.

TROVER for a trunk filled with wearing apparel, and a writing deſk.

The plantiff had returned to England from the Brazils in a ſhip, of which the defendant was maſter. The plaintiff himſelf came aſhore at the firſt port the ſhip made in the channel, and travelled to London by land. The articles in queſtion, which were part of his luggage, he left behind him to come round with the ſhip. When ſhe arrived in the River, he ſent to demand them; but the defendant refuſed to deliver them up till he ſhould be paid £15.—ſaying, that the plaintiff was to pay £30. for his paſſage, and had then paid only one-half of that ſum.

Shepherd, Serjeant, contended, that even, although £15. for the plaintiff's paſſage was due, the defendant had no right to detain his luggage for that ſum. The trunk and writing deſk were not articles of merchandize for which freight was due. They were mere acceſſaries to the plaintiff's perſon; and it was for carrying the plaintiff himſelf that the money was demandable. The defendant, therefore, had no lien upon them.

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them. It might as well be said, that the plaintiff himself might have been stopped, or that the clothes he wore might have been stripped from his body.

LAWRENCE, J. The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be given for carrying the man and the luggage; I think the captain has a lien for this upon the luggage. In detaining that, there is no greater inconvenience than in the common case of goods and merchandize carried on freight; and there is no reason why there should not be the same lien for the recovery of passage money as for the recovery of freight. I conceive the defendant had a right to say to the plaintiff, "You shall not have your things till you pay me what is due for bringing them and you from *Brazil*;" and that in refusing to deliver them up, he was not guilty of any tortious conversion.

Evidence was given that £30. was a reasonable sum for the plaintiff's passage in the steerage of the ship, and the defendant had a Verdict.

Shepherd, Serjeant, and *Comyn* for the plaintiff.

Best, Serjeant, for the defendant.

[Attornies, *Fitzgerald* and *West*.]

See all the authorities collected as to the lien of the master of a ship, *Abb. Shipp.* Part III. c. 3. § 11.

HILTON

HILTON *v.* FAIRCLOUGH.

Saturday, February 23.

Notice of the dishonour of a bill of exchange sent by the two-penny post, is sufficient where the parties live within the limits of the two-penny post, whether near or at a distance from one another; but the letter conveying the notice should be proved to have been put into a receiving house at such an hour that, according to the course of the two-penny post, it would be delivered the day on which the party to whom it is addressed was entitled to receive notice of the dishonour of the bill.

THIS was an action against the indorser of a bill of exchange, which became due on the 28th of February last.

On that day, it was presented for payment to the acceptor, who resides in *Gerard Street*, and next day, at 12 o'clock, the plaintiff put into a receiving house of the *twopenny post*, a letter, containing notice of the dishonour of the bill, addressed to the defendant at his house in *Panton Street*.

Best, Serjeant, for the defendant, contended, that this was insufficient evidence of notice.

LAWRENCE J. It has been decided in a case in *Mr. Campbell's Reports*, that a notice sent by the two-penny post is sufficient (*a*).

Best, Serjeant, said, the party sending the notice in that case resided in *London*, and the party to whom the notice was sent at *Shadwell*, an adjacent village. They could not be considered as living in the same town; and although under such circumstances a

(*a*) Scott *v.* Lifford, 1 Camp. 246.

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notice by the two-penny post might be sufficient, there was no reason why the uncertainty, delay and expence of this conveyance should be submitted to, where the parties lived within a few minutes' walk of one another.

LAWRENCE J. The rule once being laid down, that a notice by the twopenny post is sufficient, I cannot enter into any consideration of the distance at which the parties live asunder: the notice is good within the limits of the twopenny post. Here the letter being put into the receiving house about noon of the 1st of March, we know that it must have reached its destination the same evening, and the defendant had information from the holder of the bill of its dishonour, the day after it became due, which is all he could require.

Verdict for the plaintiff.

Vaughan, Serjeant, and *Taddy* for the plaintiff.

Best, Serjeant, and *Comyn* for the defendant.

[Attornies, *Nettleship* and *Cobb*.]

Vide Smith, v. Mullet, *ante* 208.

FITZGERALD

FITZGERALD *v.* ELSEE.

Saturday, February 23.

IN this caſe it became neceſſary to prove, that the defendant had executed an indenture of apprenticeſhip, by which a ſon of the plaintiff was bound to him under the uſual covenants.

If the atteſting witneſs to a deed ſwears that he did not ſee it executed, it may be proved by evidence of the hand-writing of the party.

The ſubſcribing witneſs being called for this purpoſe, ſwore that the boy executed it in his preſence; but that he had never ſeen it executed by the defendant.

Shepherd, Serjeant, for the plaintiff, then propoſed to call another witneſs to prove the defendant's hand-writing to the indenture, and mentioned a caſe before Lord ALVANLEY, where the ſubſcribing witneſs to a deed having denied that he ſaw it executed, evidence was admitted of the hand-writing of the parties.

Beſt, Serjeant, *contrà*, inſiſted, that as this indenture profeſſed to be executed by the defendant in the preſence of the atteſting witneſs, it could be proved by the atteſting witneſs, and him only. Where there appears to be an atteſting witneſs to a deed, the admiſſion of the party is inſufficient to prove it. Therefore, if the atteſting witneſs ſays, that he did not ſee the deed executed, it muſt be taken never to have been executed with due formality, and as not binding on the party, although he may have ſigned it.

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LAWRENCE, J. If the attesting witness swears, that he did not see the deed executed, I think it is then to be treated as if there were no attesting witness, and evidence of the hand-writing of the party is sufficient proof of its execution.

Evidence of the defendant's hand-writing to the indenture was accordingly admitted, and the plaintiff had a verdict.

Shepherd, Serjeant, and *Espinasse* for the plaintiff.

Best, Serjeant, for the defendant.

So if the subscribing witness to a promissory note swears that he did not see it drawn, it may be proved by evidence of the hand-writing of the maker.

Lemon v. *Dean*. *Lancaster Lent Assizes* 1810. Cor. LE BLANC, J.

Action on a promissory note, which appeared to be witnessed by one Bentley.

Bentley was called, and swore that he did not see the defendant subscribe the note, but the defendant merely desired him to try to write his name upon the paper, and that he did not observe whether any thing was at that time written on it.

Plaintiff's counsel then proposed to call witnesses to prove the defendant's hand-writing.

Williams objected that there being a subscribing witness to the note, who was not incompetent, no other evidence of it could be given. He cited Phipps v. Parker, 1 Camp. 412.

LE BLANC, J.—I will make no observation upon that case. It may be distinguishable, as there the instrument was a deed. But I am quite clear that if the subscribing witness to a note, when called, cannot prove it by reason of his not having seen it drawn, the plaintiff may proceed to prove it by other means.

Vide Fasset v. Brown. Peak. Cas. 23, Grellier v. Neale, *Ib.* 146.

OXFORD

OXFORD CIRCUIT.

LENT ASSIZES, 51 GEO. III.

GLOUCESTER.

Coram LAWRENCE, J.

Monday, March 11.

HARRIS *v.* TIPPETT.

THIS was an action for not accounting for a promiſſory note given to the defendant to be diſcounted on behalf of the plaintiff.

Any queſtion may be put to a witneſs in croſs-examination, the anſwer to which may have a tendency to diſcredit him; but if ſuch a queſtion be collateral to the matter in iſſue, the anſwer which the witneſs gives muſt be taken as concluſive, and other witneſſes cannot be called to contradict him.

A witneſs for the defendant was aſked in croſs-examination, whether he had not attempted to diſſuade a witneſs examined for the plaintiff, from attending the trial. He ſwore poſitively, *that he had not.*

Dauncey then propoſed to call back the other to contradict him.

LAWRENCE, J. That cannot be done. You muſt take his anſwer.

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Dauncey contended, that for the purpoſe of diſcrediting the witneſs, it was competent to ſhew, that he had ſworn falſely in this inſtance, and actually had attempted to diſſuade the other from attending the trial.

LAWRENCE, J. Had this been a matter in iſſue, I would have allowed you to call witneſſes to contradict what the laſt witneſs has ſworn, but it is entirely collateral, and you muſt take his anſwer. I will permit queſtions to be put to a witneſs as to any improper conduct of which he may have been guilty, for the purpoſe of trying his credit; but when theſe queſtions are irrelevant to the iſſue on the record, you cannot call other witneſſes to contradict the anſwers he gives. No witneſs can be prepared to ſupport his character as to particular facts, and ſuch collateral inquiries would lead to endleſs confuſion.

Dauncey and *Ludlow* for the plaintiff.

Jervis and *Abbott* for the defendant.

LAWRENCE J. laid down the ſame rule ſeveral times during the circuit; and it ſeems particularly illuſtrated by the following caſe, which occurred at MONMOUTH. One *Yewin* was indicted for ſtealing wheat. The principal witneſs againſt him was a boy of the name of *Thomas*, his apprentice. LAWRENCE, J. allowed the the priſoner's counſel to aſk *Thomas* in croſs-examination, whether he had not been charged with robbing his maſter, and whether he had not afterwards ſaid, he would

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would be revenged of him, and would soon fix him in *Monmouth* gaol?—He denied both. The prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him.—LAWRENCE J. ruled, that his answer must be taken as to the former; but that as the *words* were material to the guilt or innocence of the prisoner, evidence might be adduced, that they were spoken by the witness.

Vide Spenceley v. De Willott, 7 East, 108.

KING and Another *v.* MEREDITH.

Tuesday, March 12.

ACTION for the price of a quantity of brandy and rum.

As soon as goods are delivered to a carrier, they are at the risk of the purchaser, although the carrier be paid by the vendor.

The spirits were delivered by the plaintiffs to a carrier, to be conveyed to the defendant. They were then of the legal proof; but they were under proof when delivered by the carrier to the defendant, and were for that reason seized and condemned by the Excise. *The carrier was to be paid by the plaintiffs.*

Dauncey, for the defendant, contended, that for this reason, the spirits were at the risk of the plaintiffs while in the hands of the carrier, who being paid by them must be considered as their agent.

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LAWRENCE, J. The mode in which the carrier was to be paid makes no difference. The moment the ſpirits were delivered to him, the property veſted in the defendant. The plaintiffs, by paying the carrier, did not become inſurers of the ſpirits while in his hands.

The plaintiffs had a verdict.

Abbott and *Ludlow* for the plaintiffs.

Dauncey and *Wigley* for the defendant.

Vide Davis v. James, 5 Burr. 2680. Brown v. Hodgſon, *ante* 36.

Wedneſday, March 13.

WATHEN, Eſq. v. Sir E. B. SANDYS, Bart. and the Earl of BERKLEY.

If the candidates at a county election jointly deſire the ſheriff to erect huſtings, to provide poll-clerks, and to retain an aſſeſſor, promiſing to defray the expence thus incurred, they are liable jointly to an action of *indebitatus aſſumpſit* at his ſuit upon their joint undertaking, notwithſtanding ſtat. 18 G. 2. c. 18. § 7.

But the ſheriff is not entitled to charge the candidates with any part of the expence neceſſarily incurred by him in executing the writ, and making the return; and for thoſe things expreſsly ordered by the candidates, they are only bound to pay him a fair remuneration, although he himſelf may have paid more in ſubmitting to exorbitant charges uſually made on ſuch occaſions.

INDEBITATUS aſſumpſit for work and labour, and materials found and provided by the plaintiff for the defendants,—with the common money counts.

Sir

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Sir E. B. Sandys pleaded the general iſſue, and *Lord Berkley* ſuffered judgment by default.

The action was brought by *Paul Wathen*, Eſq. late ſheriff of Gloceſterſhire, to recover the expenſes he had incurred at the election of a member of parliament, to repreſent this county in May laſt, when the two defendants were candidates, and Lord Berkley was returned.

The plaintiff's demand was compoſed of the following items:—

SHERIFF'S OFFICE.

	£	s.	d.	£	s.	d.
Advertiſements	3	3	0			
Indentures	2	2	0			
Stamps	3	10	0			
Underſheriff	21	0	0			
County Clerk	6	6	0			
Bailiff	2	2	0			
Hall-keeper	1	1	0			
Filing writ	1	1	0			
				40	5	

ASSESSOR.

Mr. ———, retainer and clerk	6	6	0			
Mr. ———'s fee	315	0	0			
His clerk	21	0	0			
Agents' Fees	15	15	0			
Attendances, letters, &c.	10	10	0			
				368	11	0

BOOTHS.

Erecting booths (ſum recovered againſt the ſheriff by the builder)	825	5	0			
Painting liſt of hundreds	1	11	6			
Printing do. Pariſhes	1	11	6			
Conſtables guarding booths	4	4	0			
Three ſurveyors	21	0	0			
Printing poll-books	11	5	0			
Printing oaths	1	1	0			
Rent of ground	30	0	0			
				895	18	0

Fifteen

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Fifteen poll clerks, and coach hire, and expences from town, &c. - -	173	5	0
Agents' fees, procuring ſame - -	15	15	0
		189	0 0
	£1493	14	0

It was ſworn, that *Lord Berkeley* and his agents firſt requeſted the ſheriff to erect huſtings, to retain an aſſeſſor, and to procure poll-clerks from London; that the ſheriff gave directions for doing ſo; that ſome days before the election began, *Sir E. B. Sandys* concurred in every thing that had been done; and that both candidates promiſed to contribute to the expence of theſe preparations. Huſtings were accordingly erected; a gentleman at the bar was brought down as aſſeſſor; and fifteen poll clerks arrived from London. But on the morning fixed for the election, *Sir E. B. Sandys* declined, and *Lord Berkeley* was returned without oppoſition. It was proved, that the plaintiff had actually made all the payments mentioned in the bill.

Taunton, for *Sir E. B. Sandys*, contended, *firſt*, that a joint action could not be maintained againſt both candidates. By ſtat. 18 Geo. 2. c. 18. § 7. it is provided, that the ſheriff ſhall erect, at the expence of the candidates, ſuch number of convenient booths for taking the poll, as the candidates or any of them ſhall, three days at leaſt before the commencement of the poll, deſire, and ſhall affix the names of the hundreds, and appoint poll clerks, &c. But it could never be the intention of the legiſlature to make each candi-

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date liable for all the expences which ſhould thus be incurred at the election. Upon this conſtruction of the ſtatute, the whole might be levied upon a candidate who had no wiſh that huſtings ſhould be erected at all, and his remedy againſt the others for a contribution might be difficult and uncertain. The candidates muſt be taken to be ſeparately liable for their reſpective proportions. — At any rate this action was miſconceived. There was no liability at common law to reimburſe the ſheriff for any part of the expence he incurred. He ought therefore to have declared ſpecially, that he provided booths, poll clerks, &c. upon the requiſition of the candidates; whereby, and by means of the ſtatute in that caſe made and provided, they became liable to reimburſe him for the expence he had thus incurred, and that being ſo liable they promiſed to reimburſe him accordingly. — If the action could be maintained in its preſent form, it would be for his lordſhip to ſay to what amount the plaintiff was entitled to recover.

LAWRENCE J.—Both objections admit of the ſame anſwer. The plaintiff does not proceed upon the ſtatute. If the ſheriff had merely been deſired to erect booths in purſuance of the ſtatute, then we ſhould have had to conſider what remedy the ſtatute gives him. But there is an expreſs undertaking on the part of both to pay for the huſtings, the aſſeſſor, and the poll clerks, on which the two are jointly liable.—However, although the action is certainly maintainable, there are ſeveral parts of the plaintiff's demand with which he has no right to charge the defendants. The firſt

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eight items amounting to 40l. 5s. for the indentures, &c. only concern the execution of his office of ſheriff, and there is no pretence for throwing them upon the candidates. The ſame thing may be ſaid of the charge for conſtables. The ſheriff is bound to preſerve the peace of the county. If he is put to any extraordinary expence in this way, let him repreſent the matter when he paſſes his accounts in the Exchequer, or directly to His Majeſty's government. Any claims he may have for remuneration will thus be attended to; but he has no more right to recover ſuch charges from a candidate at the election, than from any other individual in his bailiwick (*a*). — There were ſeveral other items that his Lordſhip adviſed the jury to diſallow entirely, ſuch as the *ſurveyors*, and *printing the poll books*.—Another claſs he adviſed them conſiderably to reduce. The plaintiff could only recover the original expence of erecting the huſtings, not the coſts of any action brought againſt him by the perſon who had erected them. For the aſſeſſor his Lordſhip thought the defendants liable, although this be an expence not mentioned in the ſtatute, which was meant for the protection of the ſheriff, not of the candidates; but the accompanying charges for agents' fees, &c. in retaining the aſſeſſor, he conſidered as exorbitant. Advantage, he obſerved, was often taken of the ſituation of candidates to ſit in parliament, who were afraid

(*a*) By 10 & 11 W. 3. c. 7. the ſheriff is entitled to charge to His Majeſty the fees he pays in the Crown-office, and to have an allowance thereof in his account in the Exchequer.

to

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to reſiſt any demand, however unreaſonable, leſt they ſhould render themſelves unpopular; and thus a ſort of cuſtom was ſet up for the impoſitions practiſed upon them; but ſuch charges as 25 guineas for leaving a retainer with a gentleman at the bar, and paying him his fee, could not be ſupported in a court of juſtice, however long eſtabliſhed.

The jury found a verdict for the plaintiff for 1360l.

Dauncey and *Abbott* for the plaintiff.

An application was made in the enſuing term by Sir E. B. Sandys for a new trial, on the ground that, from the abſence of a material witneſs, he had been ſhut out from his defence; and that in point of fact he had not ordered the huſtings, or promiſed to pay for them; but the direction of the judge at Niſi Prius was in no reſpect queſtioned.

Vide Morris v. Burdett, 1 Campb. 218. Heyw. 269.

HERE-

HEREFORD.

Coram LAWRENCE, J.

Tuesday, March 19.

The KING *v.* WILLIAMS, Esq.

If the defendant is charged by a count in an indictment with having "composed, *printed* and published" a libel, if the evidence be, that he only composed and published it, he may be found guilty of the *composing* and *publishing*, and acquitted of the *printing*.

THIS was an indictment for a libel, which was charged in several counts to have been composed, *printed*, and published by the defendant.

The counsel for the prosecution gave in evidence a M. S. copy of the libel, in the defendant's hand-writing, which he had himself delivered to a printer, and a printed copy, which had been printed and sold by his orders. From some typographical blunders, there was a variance between the printed copy and the libel set forth in the indictment; but the M. S. corresponded with it exactly.

The counsel for the defendant insisted, that the offence was not proved as laid, and that he was entitled to an acquittal.

LAWRENCE, J.—There is certainly no proof that the defendant *printed* the libel in question; but he may be acquitted of the *printing*, and found guilty of the *composing* and *publishing*. His delivering the libel in his own hand-writing to the printer, is abundant evidence of the latter offence.

A verdict

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A verdict was accordingly found and recorded of "Guilty, except as to printing the libel."

Taunton and *J. Jones* for the prosecution.

Dauncey, *Abbott*, and *Peake* for the defendant.

Vide Rex v. Hunt, *ante* 583.

THOMAS d. JONES and WIFE *v.* REECE THOMAS.

Tuesday, March 19.

EJECTMENT by landlord against tenant from year to year. The demise was laid on the 1st of October last.

If a notice to quit is served personally on the tenant in possession, and he makes no objection to it, this is prima facie evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expires.

Abbott, for the lessor of the plaintiff, gave in evidence, receipts for rent payable at Michaelmas, and proved, that a notice to quit at Michaelmas last had been served upon the defendant personally at the preceding Lady-day, when the defendant made no objection to its regularity.

Taunton, for the defendant, insisted, that it was necessary to give further evidence of the tenancy having commenced at Michaelmas.

LAWRENCE J. I remember C. J. Eyre ruling on the

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the Western circuit (*a*), that a notice to quit if not objected to by the tenant in poſſeſſion when ſerved upon him, is *prima facie* evidence, that the tenancy commenced at the ſeaſon of the year when the notice expires. I have acted upon that caſe, and I am not aware that it has ever been overturned. Here, I will admit evidence to ſhew the commencement of the tenancy to have been from Chriſtmas, Midſummer, or Lady-day; but till the contrary is ſhewn, I will preſume, from the defendant's making no objection to the notice, that it commenced at Michaelmas.

The leſſor of the plaintiff had a verdict; — to ſet aſide which *Taunton* moved in the enſuing term, on the authority of *Doe d. Aſh* v. *Calvert*, *ante* 388, where Lord ELLENBOROUGH is repreſented to have held, that a notice to quit is not *prima facie* evidence of the period of the year when the tenancy commenced; and to have ſaid, that "to make the party's own act evidence in his favour, is contrary to firſt principles."

COURT.—There the notice to quit was not ſerved perſonally upon the defendant; and the notice *per ſe* is certainly no evidence for the leſſor of the plaintiff. But here, the notice was ſerved perſonally upon the defendant, and he made no objection to it. If there was any doubt, whether he thereby admitted its regularity, this was a queſtion of fact, which the de-

(*a*) Doe dem. Puddicombe v. Harris. 1 T. R. 161.

fendant's

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fendant's counſel might have had ſubmitted to the Jury. Whether the perſonal ſervice and ſilence of the tenant in poſſeſſion amout to an admiſſion, muſt depend upon circumſtances. If he cannot read, or does not read the notice in the preſence of the perſon who ſerves it upon him, it muſt go for nothing. In the preſent caſe, we muſt ſuppoſe that the defendant read the notice and underſtood its contents, and that the perſon who ſerved it ſtayed ſo long that the defendant might have objected to it in his preſence, but made no objection. Theſe circumſtances, we think, amount to primâ facie evidence of the commencement of the tenancy, and being uncontradicted, they ſupport the verdict.—

Rule to ſhew cauſe refuſed.

But in Oakapple d. Green *v.* Copous, 4. T. R. 361. where a tenant in poſſeſſion, when ſerved with a notice to quit at *Midſummer* ſaid, "I pay rent enough already, and it is hard to uſe me thus," he was permitted to ſhew that he held from *Michaelmas*; and BULLER, J. obſerved, that whether the tenant aſſents to be conſidered as holding from the time mentioned in the notice, is a queſtion of fact for the jury. *Vide* Doe *v.* Wombwell, *ante* 559.

SALOP.

CROWN SIDE. Cor. LAWRENCE, J.

Wednesday, March 27.

REX *v.* ELIZABETH RIDLEY.

An indictment against a master for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated must allege that the servant was *of tender years, and under the dominion and controul of the master.*

THE indictment stated, that Elizabeth, the wife of Samuel Ridley, unlawfully and maliciously contriving and intending to hurt and injure one Elizabeth Williams, being a servant to her the said Elizabeth Ridley, heretofore to wit, on &c. and on divers other days and times, as well before as after that day, with force and arms, at &c. unlawfully, wilfully and maliciously did omit, neglect and refuse to provide for and give and administer to the said Elizabeth Williams, sufficient meat and drink, necessary for the sustenance, support and nourishment of the body of her the said Elizabeth Williams, and expose the said Elizabeth Williams to the cold and inclemency of the weather, as well within as without the house wherein she the said Elizabeth Ridley then dwelt, and keep the said Elizabeth Williams without sufficient and proper warmth necessary for the health of her the said Elizabeth Williams, to wit, at &c. the said Elizabeth Williams on the several days and times, and during all the time aforesaid, being the servant of the said Elizabeth

zabeth Ridley, and the ſaid Elizabeth Ridley on the ſeveral days and times, and during all the time aforeſaid, living ſeperately and apart from the ſaid Samuel Ridley her huſband, to wit, at &c. contrary to the duty of her the ſaid Elizabeth Ridley as the miſtreſs of the ſaid Elizabeth Williams: By reaſon of all which premiſes ſhe the ſaid Elizabeth Williams afterwards, to wit on, &c. became and was, and for a long time, to wit, the ſpace of ſix months then next following, continued to be very weak, ſick and ill, and greatly conſumed and emaciated in her body, to wit, at &c. to the great damage of the ſaid Elizabeth Williams, in contempt, &c. to the evil example, &c. and againſt the peace, &c.

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The caſe being opened——

LAWRENCE J. intimated, that he thought the indictment inſufficient, in not alleging *that Elizabeth Williams was a girl of tender years and under the dominion and controul of the defendant.*

The counſel for the proſecution contended, that it was enough to ſtate, that ſhe was the ſervant of the defendant. From the relation of maſter and ſervant, a duty ariſes on the part of the maſter, to provide neceſſary ſuſtenance for the ſervant; and a breach of this duty, whereby the ſervant becomes ſick, diſeaſed and emaciated, muſt be a miſdemeanor. Indictments for murder have frequently been ſuſtained

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for ſtarving perſons to whom it was the duty of the priſoners to have adminiſtered proper nouriſhment. If an indictment for *murder* will lie where death is the direct conſequence of the ſtarving, an indictment which ſtates the conſequence to be, that the party became ſick, diſeaſed and emaciated, ſets forth what is in law a *miſdemeanor*.—At any rate, the objection was on the record.

LAWRENCE J. — There was a caſe ſimilar to this before Mr. Juſtice LE BLANC, at Exeter in 1802. The indictment charged, that the defendant did not provide proper and neceſſary food and clothing for a perſon who was his ſervant, whereby the latter became ſick, &c. The defendant was found guilty; but Mr. Juſtice LE BLANC reſerved the point for the opinion of the judges. Ten of the judges met to conſider the caſe, and a majority of thoſe preſent were of opinion, that the indictment was inſufficient, in not alleging that the ſervant was of tender years and under the controul and dominion of the defendant. The trial may proceed, as iſſue is joined upon the guilt or innocence of the defendant of the offence laid to her charge; but on a motion in arreſt of judgment I ſhall conſider myſelf bound by the deciſion I have mentioned. There is a clear diſtinction between treatment of this ſort to a child and to an adult. The latter, if not provided with proper nouriſhment, may remonſtrate, may leave the ſervice, or may complain to a magiſtrate. The withholding of proper food from ſuch a perſon may be a breach of contract; but it is not

not a crime of which the law will take cognizance. Doubts have been entertained, how far an indictment can be supported from mere *non feazance* towards a child of tender years. I am myself of opinion, that there are circumstances where non-feazance of this description may be an indictable offence. If Elizabeth Williams was of tender years, and under the dominion of the defendant, so that she could not have taken steps to relieve herself from the treatment she is supposed to have received, the defendant may be guilty of a misdemeanor. But you have not alleged this in the indictment, and it is therefore bad upon the face of it.

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It was then suggested, that in this case, the indictment charged, that the defendant exposed Elizabeth Williams to the inclemency of the weather.

LAWRENCE, J.—That, to be sure, is an act in the nature of an assault, for which the defendant may be liable, of whatever age the servant was; but the evidence opened, does not at all apply to such a charge.

The counsel for the prosecution allowed, they could not prove this charge in the indictment to any extent; and his Lordship being of opinion, that the omission to state that the girl was of tender years and under the dominion of the defendant, was fatal as to the withholding food and warmth, they declined to proceed farther, and consented to an acquittal.—It was said, the girl was 15 years old.

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Clifford and *Abbott* for the profecution.

Dauncey, *Hart* and *Gleed* for the defendant.

Vide Regina v. Gould, Salk 381. Rex v. Stephen Self, 1 Leach. Cro. Caſ. 163.—Eaſt, C. P. c. v. § 13. and the authorities there referred to.

WORCESTER.

CROWN SIDE. Cor. LAWRENCE, J.

Friday, April 5.

REX v. THOMAS ROGERS.

To ſupport an indictment on 42 G. 3. c. 107, for courſing deer in an incloſed ground, it is neceſſary, on the part of the profecution, to call the owner of the deer to prove, that he did not give his conſent to the priſoner to courſe them.

THIS was an indictment on 42 Geo. 3. c. 107. § 1. (*a*) for courſing deer in an incloſed ground, belonging to R. B. C. Eſq. *without the conſent of the ſaid R. B. C.*, the

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(*a*) Which enacts, "that if any perſon or perſons ſhall wilfully courſe or hunt, or take in any ſlip, nooſe, toil or ſnare, or kill, wound or deſtroy, or ſhoot at, or otherwiſe attempt to kill, wound or deſtroy, or ſhall carry away any red or fallow

the owner of such deer, and without being otherwise duly authorized,

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The question was, whether the onus lay upon the prisoner, to prove that he had the consent of R. B. C., the owner of the deer, to course them in the place in question?

LAWRENCE, J. held, that it was necessary on the part of the prosecution, to call the owner of the deer, for the purpose of proving, that he had *not* given his consent to the prisoner to course them; and this witness not appearing, the Jury were directed to find a verdict of

Not Guilty.

Mence for the prosecution.

Campbell for the prisoner.

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low deer kept or being in the inclosed part of any forest, chase, purlieu, or ancient walk, or any inclosed park, paddock, wood or other inclosed ground wherein deer are, or have been, or shall be usually kept, *without the consent of the owner of such deer*, or without being otherwise duly authorized, or shall knowingly be aiding, abetting or assisting therein or thereunto, every person so wilfully offending as aforesaid in any of the cases above mentioned, shall be deemed and taken to be guilty of *felony*, and being lawfully convicted thereof, upon indictment, shall be adjudged to be transported for the term of seven years."

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[It may be useful to refer to the following short note of *Fenton* v. *Goundry*, till a more full and satisfactory report of the case shall be published by Mr. EAST.]

FENTON v. GOUNDRY.

It is no cause of demurrer to a declaration against the acceptor of a bill of exchange accepted payable at a particular place, that it does not allege that the bill was presented there for payment.

FENTON v. GOUNDRY and others, K. B. E. T. 1811.

The plaintiff declared that he drew a bill of exchange, dated 4th February 1810, for 237*l.* 12*s.* 6*d.* payable to his own order at 4 months after date, directed to the defendants (by the name, style and description of William Goundry and Co. 54, Lower Shadwell, Wapping, London); that the defendants accepted the bill according to the usage and custom of merchants, *payable at C. Sykes, Snaith and Co.'s*; that the plaintiff made no order for payment of the bill; whereby the defendants became liable to pay him the bill at the time the same should become due, according to the tenor and effect of the said bill, and of their said acceptance thereof as aforesaid; which they promised to do. The money counts followed, with the common breach — Special demurrer to the first count, for that it did not thereby appear that the bill was ever presented for payment at *C. Sykes, Snaith and Co.'s* according to the acceptance.

Marryat having been heard in support of the demurrer, and *Holroyd* contrâ,—

Lord ELLENBOROUGH, C. J. and GROSE and BAYLEY, Justices, (absente Le BLANC, J.) declared themselves clearly of opinion, that it was unnecessary to allege a presentment for payment at *Sykes, Snaith and Co.'s*. 1. They considered the place where the bill is made payable as no part of the contract any more than the place of the acceptor's residence, which is generally mentioned in the direction of the bill; that if this were a special acceptance, the drawer and previous indorsers would be discharged; and that by all the authorities upon the subject, (with the exception of the late case of *Callaghan* v. *Aylett*,) the acceptor of a bill of exchange is held to be universally liable upon it, wherever it may be expressed to be payable.— 2dly. They thought that, even if the place where the bill is made payable by the acceptor were not a mere memorandum but a part of the contract, still the defendant could not demur on account of there being no presentment there alleged in the declaration; because he would not be discharged, although the bill was not presented

ſented there for payment; and if he was there ready to pay it on the day it became due, he could only plead this in bar of damages, bringing the money into Court, as in the caſe of rent payable on the land, or money to be paid at a given time and place in purſuance of an award.

However, as the point was of ſo much conſequence, the Judges ſaid, they would take further time to inquire into the deciſion in the Common Pleas.—They did not again mention the caſe of *Fenton* v. *Goundry* in the courſe of Eaſter Term; but Lord ELLENBOROUGH C.J. and BAYLEY J. have both held at *Niſi Prius* ſince, that, in an action againſt the acceptor, there is no occaſion to prove that the bill was preſented for payment at the place where it is made payable by the acceptance.

June 1, 1811.

AN

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1. It is actionable to discharge a gun so near an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy. *Carrington* v. *Taylor*, 258

2. Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped *by order and on account* of the consignee. The consignor cannot maintain any action against the ship-owner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship. *Brown* v. *Hodgson*, 36.

3. A Frenchman domiciled at *Lisbon* consigns a cargo, which is his property, to *Nantes*, under the name of a native Portuguese, who acts as '*neutralizer*:' The ship being taken and brought into an English port, the cargo is libelled in the court of Admiralty: The Portuguese, with the privity of the Frenchman, claims it, and it is decreed to be delivered up to him as neutral property. — *Held*, that an action at law could not afterwards be maintained by the Frenchman against the Portuguese to recover the proceeds of the cargo. *De Metton* v. *De Mellon*, 420

4. It is agreed between *A.* and *B.* that *A.* for certain commission shall ship a cargo of wheat, of a specific quality, at a foreign port for *B.* in England. The wheat shipped by *A.* being found upon its arrival to be of an inferior quality, *B.* brings an action against *A.* for a breach of the agreement, and recovers damages — Held, that *A.* cannot afterwards maintain an action

action againſt *B.* for the commiſſion, as his claim for this might have been given in evidence in the former action to reduce the damages. *Kiſt* v. *Atkinſon*, 63.

5. *A.* pays a ſum of money into a banker's for a ſpecific purpoſe, the banker's clerk, by miſtake, pays this money to *B.* who has no right to it. Held, that *A.* cannot maintain an action againſt *B.* to recover it back. *Rogers* v. *Kelly*, 123

6. A man's creditors enter into an agreement with him not under ſeal, to take 20l. per cent. upon their reſpective debts, in ſatisfaction of the whole; — 10l. per cent. to be paid within a month, and the remaining 10l. per cent. to be ſecured by the acceptances of a third perſon at 5 and 9 months. The compoſition is paid purſuant to the agreement. — A creditor who has ſigned the agreement and received the compoſition, cannot afterwards bring an action for the reſidue of his debt. *Steinman* v. *Magnus*, 124

7. Where a man's creditors agree to take a compoſition on their reſpective debts, to be ſecured partly by the acceptances of a third perſon, and partly by his own notes, and to execute a compoſition deed containing a clauſe of releaſe, he cannot be ſued for the original debt due to a creditor who had promiſed to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refuſed to execute the compoſition deed after it had been executed by all the other creditors. *Bradley* v. *Gregory*, 383

8. An action cannot be maintained by a brick-maker for the price of bricks which are under the ſtandard dimenſions required by ſtat. 17 G. 3. c. 42. although, when ſold, they were ſelected by the purchaſer himſelf, and they were afterwards uſed by him in building a houſe, without any complaint being made as to their ſize or quality. *Law* v. *Hodgſon*, 147

9. An action for the expences of ſuing out and proſecuting a commiſſion of bankrupt till the choice of aſſignees, cannot be maintained againſt the petitioning creditor and another perſon. *Finchett* v. *How*, 275

10. If the candidates at a county election jointly deſire the ſheriff to erect huſtings, to provide poll-clerks, and to retain an aſſeſſor, promiſing to defray the expence thus incurred, they are liable jointly to an action of *indebitatus aſſumpſit* at his ſuit upon their joint undertaking, notwithſtanding ſtat. 18 G. 2 c. 18. § 7.

But the ſheriff is not entitled to charge the candidates with any part of the expence neceſſarily incurred by him in executing the writ, and making the return; and for thoſe things expreſsly ordered by the candidates, they are only bound to pay him a fair remuneration, although he himſelf may have paid more in ſubmitting to exorbitant charges uſually made on ſuch occaſions. *Wathen* v. *Sandys*, 640

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 4. LEASE.

ALIEN ENEMY.

If to a plea, that *A.* for whoſe benefit the action is brought, is an *alien enemy*, the replication ſtate that *A.* is reſident in this country by the licence of our lord the King; to ſupport an iſſue taken upon this fact, it is not enough for the plaintiff to prove that a licence was granted by our King to *A.* while an alien *amie* to undertake a voyage to a foreign country and

from thence to England, which did not terminate till after the commencement of hoſtilities between his country and ours, and that after the termination of the voyage he went about at large here, without being moleſted by the Engliſh government. *Boulton* v. *Dobree*, 163

APPRENTICESHIP.

1. A man is not liable to penalties under 5 Eliz. c. 4. as for exerciſing a trade without having ſerved an apprenticeſhip to it, who merely exerciſes the trade incidentally as a branch of his general buſineſs. Therefore, a maſter coachmaker may lawfully keep journeymen blackſmiths in his employ to make the iron work of coaches, although he has not ſerved an apprenticeſhip to the trade of a blackſmith. *Coward* v. *Maberley*, 127

— So of a maſter carpenter, and journeymen ſawyers, *Ib.*

2. An action will not lie on 5 Eliz. c. 4. for ſetting to work a perſon who had not ſerved an apprenticeſhip in the buſineſs of a *coach-maker*, that buſineſs not being known in England when the ſtatute paſſed. *Pride q. t.* v. *Stubbs*, 397

3. A maſter workman employs in a trade within 5 Eliz. c. 4. a perſon who had never before worked in it, under a parol agreement to teach him the buſineſs, in conſideration of a premium, and to pay him weekly wages. This is not an apprenticeſhip within the meaning of the ſtatute; and the maſter is thereby ſubject to a penalty for *ſetting to work* in his trade one who had not ſerved therein ſeven years as an apprentice. *Beale q. t.* v. *Geale*, 1

4. In an action on 5 Eliz. for ſetting to work a journeyman who has not ſerved an apprenticeſhip, the plaintiff cannot recover any penalty that had been incurred a year before the commencement of the ſuit, although the defendant continued to employ the ſame journeyman within the year. *Evans q. t.* v. *Hunter*, 293

ARREST.

See MALICIOUS ARREST.

ASSUMPSIT, ACTION OF.

An action of *aſſumpſit* cannot be maintained on a running account between a merchant and a broker—the proper remedy at law being, an action of *account*. *Scott* v. *M'Intoſh*, 238

In aſſumpſit, a releaſe may be given in evidence under the general iſſue. *Hawley* v. *Peacock*, 557

ASSUMPSIT IMPLIED.

See ACTION, 5.

1. A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party: an action of trover is afterwards brought by the aſſignees againſt him, the ſheriff, and the bailiff, in which damages are recovered; and theſe, together with the coſts, are paid by the bailiff.—Held that there is no implied promiſe on the part of the plaintiff in the original ſuit to indemnify the bailiff, or to contribute to the damages and coſts in the action of trover; but that the bailiff might maintain *money had and received*, to recover back the levy money paid over. *Wilſon* v. *Milner*, 452

2. There is no implied promiſe on the part of an officer in the Eaſt India Company's ſervice to pay the captain of a company's ſhip by which he returns to England, more than the regulation ſum for his paſſage, although

although it may have been uſual to pay more. *Adderley* v. *Cookſon*, 15

ATTESTING WITNESS.

1. In an action on a poſt-obit bond, it appeared that the atteſting witneſs was an attorney, who formerly had an office in London, and reſided at Sydenham.—Held that it was not enough, to let in evidence of his hand-writing to prove the execution of the deed, that he had diſappeared from his office in London for a twelvemonth before the trial, and had not been heard of during that period by perſons who knew him, without ſhewing that ſearch had been made after him at the houſe he occupied at Sydenham. *Wardell* v. *Fermor*, 282

But evidence of his hand-writing was admitted, on proof that a twelvemonth ago, a commiſſion of bankrupt had been ſued out againſt him, to which he had never appeared, *Ib.*

2. If the atteſting witneſs to a deed ſwears that he did not ſee it executed, it may be proved by evidence of the hand-writing of the party. *Fitzgerald* v. *Elſee*, 635

3. So if the ſubſcribing witneſs to a promiſſory note ſwears that he did not ſee it drawn, it may be proved by evidence of the hand-writing of the maker. *Lemon* v. *Dean*, 636 *n*

4. If the plaintiff declares upon a deed, and there is no plea of *non eſt factum*, ſtill, if at the trial he would read any part of the deed which is not upon the record, he muſt prove it by the atteſting witneſs in the uſual way. *Williams* v. *Sills*, 519

ATTORNEY.

See ACTION, 9.

1. Where two perſons are liable to an attorney for buſineſs done on their joint retainer, it is ſufficient for him to deliver a copy of his bill in purſuance of 2 G. 2. c. 23. to one of them, from whom he received his inſtructions, and to whom the management of the buſineſs was left by the other. *Finchett* v. *How*, 277

Aliter of a delivery to that one who did not intermeddle; for he cannot be conſidered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill. *Ib.*

2. In an action on an attorney's bill, it is ſufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what ſhould appear to be due, and the maſter's allocatur thereupon. *Lee* v. *Jones*, 496

3. In an action on an attorney's bill, the plaintiff cannot give parol evidence of the contents of the bill delivered, without a notice to produce it: but a copy made at the ſame time with the bill delivered, is good evidence, without ſuch notice. *Philipſon* v. *Chaſe*, 110

4. *A.* having a demand upon *B.*, *B.* before *A.* commences any action, employs *C.* his attorney, to make certain propoſitions to *A.* upon the matters in difference between them. *C.* cannot be examined as to what *B.* ſaid upon the occaſion, for this is to be conſidered a privileged communication between attorney and client. But what *C.* ſaid when he made the propoſitions to *A.* is good evidence againſt *B.* without further proof of *C.* being authorized by him than the fact of *C.* being his attorney. *Gainſford* v. *Grammar*, 9

5. An attorney is not at liberty to diſcloſe in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cauſe before the Court. *Rex* v. *Withers*, 578

BAIL BOND.

1. Although it be irregular to bring an action on a bail bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of *non eſt factum*. *Wright* v. *Walmſley*, 396

2. In an action on a bail bond againſt one of the ſureties, the declaration averred, that by a writ of latitat the ſheriff was commanded to take "one *Francis* J. by the name of *John* J."—Held, that this averment was not ſupported by evidence of a latitat in the common form, commanding the ſheriff to take *John* J.; although the bail bond was ſigned by the principal, "Francis J. arreſted by the name of John J.," and the plaintiffs offered to prove that this perſon was their debtor, whom they meant to hold to bail. *Scandover* v. *Warne*, 270

BANKERS.

See ACTION, 5. BANKRUPT, 10. BILLS OF EXCHANGE, 11. PROMISSORY NOTES and CHEQUE. INDICTMENT, 5.

1. If bankers pay a cancelled cheque drawn by a cuſtomer, under circumſtances which ought to have excited their ſuſpicion, and induced them to make enquiries before paying it, they cannot take credit for the amount. *Scholey* v. *Ramſbottom*, 485

2. Bankers cannot charge *intereſt upon intereſt*, without an expreſs contract for that purpoſe. *Dawes* v. *Pinner*, 486

3. In an action by bankers to recover the amount of a bill of exchange accepted by the defendant payable at their houſe, and paid by them after it was indorſed, they are bound to prove the indorſement by the payee as well as the acceptance by the defendant. *Forſter* v. *Clements*, 17

4. A banker in London who receives a cheque by the general poſt, is not bound to preſent it for payment till the following day. *Rickford* v. *Ridge*, 357

5. Bankers having accepted bills for the accommodation of a trader, he, after committing an act of bankruptcy, but before a commiſſion is ſued out, lodges money with them to take up the bills, which do not become due till after a commiſſion is ſued out, and are then regularly paid by the acceptors.—Held that they were bound to refund this money to the aſſignees, and that they neither had a right of ſet off under 5 G. 2. c. 30.; nor could protect themſelves under 19 G. 2. c. 32. as having received the money in payment of bills of exchange in the ordinary courſe of trade. *Tamplin* v. *Diggins*, 312

BANKRUPT.

See BILLS OF EXCHANGE.

1. A man is not a trader within the meaning of the bankrupt laws by building a public theatre to be held in ſhares, for which he was to be paid according to meaſure and value, he himſelf being proprietor of ſeveral ſhares;—nor by erecting public baths on ground of which he was joint tenant in fee. *Williams* v. *Stevens*, 300

2. A trader commits an act of bankruptcy, by aſſigning all his ſtock in trade to *A.* who is a party to the deed of aſſignment. Although *A.* cannot himſelf ſue out a commiſſion of bankaupt againſt him, upon this act of bankruptcy, he may act as an aſſignee under a commiſſion ſued out upon it by a third perſon. *Jackſon* v. *Irvin*, 49

3. In actions by aſſignees of bankrupts, to which the general iſſue was pleaded before the paſſing of Sir Samuel

Romilly's act, 49 Geo. III. c. 131 the proceedings under the commiſſion are ſufficient evidence to prove the trading act of bankruptcy, and petitioning creditor's debt. *Willock* v. *Smith*, 184

4. Although in an action by the aſſignees of a bankrupt, the defendant has once pleaded, without giving notice under 49 G. 3. c. 121. ſ. 10. which the ſtatute requires to be given, "at or before the time of his pleading," yet if he has leave to withdraw his plea and plead *de novo*, ſuch a notice given with the ſecond plea is ſufficient, 325

5. In an action by the aſſignees of a bankrupt, if no notice be given under 49 Geo. 3. c. 131. that the validity of the commiſſion is diſputed, the petitioning creditor's debt is ſufficiently proved by the depoſition of the petitioning creditor himſelf before the commiſſioners. *Biſſe* v. *Randall*, 493

6. In an action by the aſſignees of a bankrupt, upon proof that the petioning creditor's debt once exiſted, the law will preſume that it continued down to the time of the bankruptcy. *Jackſon* v. *Irvin*, 50

7. Goods in the hands of a retail dealer *upon ſale or return*, paſs under a commiſſion of bankrupt againſt him, by 21 Jac. 1. c. 19. *Liveſay* v. *Hood*, 83

8. If the goods of a trader are taken in execution after an act of bankruptcy, and the money ariſing from the ſale paid over by the ſheriff two months before a commiſſion is ſued out, the bankruptcy will overreach the execution, notwithſtanding 46 G. 3. c. 135. which protects all bonâ fide *payments* and *tranſactions* by or with the bankrupt more than two calendar months before the date of the commiſſion. *Blogg* v. *Phillips*, 129

9. A warrant under a *fi. fa.* againſt the goods of a trader is directed to his ſervant and another perſon as ſpecial bailiffs: They in conſequence take poſſeſſion of the goods in his ſhop; but the buſineſs of the ſhop, though without the trader's interference, is carried on apparently as uſual: While things are ſo ſituated, the trader commits an act of bankruptcy. Held, that the goods paſs under the commiſſion to the aſſignees; as the poſſeſſion of the ſervant was the poſſeſſion of the maſter, and the goods were thus in the *poſſeſſion, order, and diſpoſition* of the bankrupt at the time of the bankruptcy. *Jackſon* v. *Irvin*, 48

10. Bankers having fraudulently ſold out ſtock belonging to a cuſtomer, which ſtood in their names, and applied the proceeds to their own uſe; while they remained ſolvent wrapped up certain bonds belonging to them in an envelope inſcribed with the cuſtomer's name, and incloſing a memorandum, ſtating that they had depoſited the bonds with him as a collateral ſecurity for his ſtock, which they promiſed to replace: This parcel they in fact depoſited among the ſecurities belonging to other perſons who dealt with them, but gave no information of any of theſe circumſtances to the cuſtomer till the eve of their bankruptcy, when they ſent him the parcel with the bonds, ſaying they muſt ſtop payment next morning. *Held* that the cuſtomer could not retain the bonds againſt the aſſignees of the bankers. *Wilſon* v. *Balfour*, 579

11. If *A.* a ſhopkeeper, procure *B.* to diſcount accommodation bills drawn by him and accepted by third perſons, and *B.* afterwards require *A.* to give him a collateral ſecurity for the payment of the bills; upon which *A.* ſecretly depoſits with him a quantity of goods from his ſhop, to

to be ſold for *B.*'s benefit if the Bills ſhould not be paid; and ſoon after, *A.* becomes bankrupt, and the bills are diſhonoured: the depoſiting of the goods in this manner as a ſecurity, cannot be invalidated as a voluntary preference in contemplation of bankruptcy. *Croſby* v. *Crouch*, 166

BARON AND FEME.

See COVERTURE. CRIM. CON.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKERS. BANKRUPT, 11. EVIDENCE, 9. VARIANCE, 2, 3, 4, 5, 6.

1. An action at law cannot be maintained againſt the acceptor of a bill of exchange which was loſt, after being indorſed, although a bond of indemnity has been tendered to the defendant. *Pierſon* v. *Hutchinſon*, 211
2. If a bill when loſt had only a ſpecial indorſement upon it, the indorſee may recover at law, without producing the Bill. *Long* v. *Baillie*, 214 *n*
3. An inſtrument acknowledging the receipt of drafts for the payment of money, and promiſing to repay the money, is a ſpecial agreement and not a promiſſory note. *Williamſon* v. *Bennett*, 417
4. Upon an inſtrument in the common form of a joint and ſeveral promiſſory note, ſigned by three perſons, there is an indorſement written at the time of ſigning it, ſtating that the note is taken as a ſecurity for all balances to the amount of the ſum within ſpecified which one of the three might happen to owe to the payee; that the note ſhould be in force ſix months; and that no money ſhould be liable to be called for ſooner in any caſe. In an action againſt one of the ſureties, the payee cannot declare upon this inſtrument as a promiſſory note, payable either on demand, or at ſix months after date. Between theſe parties, the inſtrument is an *agreement*, and muſt be ſtamped and declared upon as ſuch. *Leeds* v. *Lancaſhire*, 205
5. If a bill of exchange be accepted by the drawee, another perſon who, for the purpoſe of guaranteeing his credit, likewiſe accepts the bill in the uſual form, is not liable as acceptor, but muſt be ſued upon his collateral undertaking. *Jackſon* v. *Hudſon*, 447
6. If a promiſſory note appears on the face of it to be the ſeparate note of A. only, it cannot be declared on as the joint note of A. and B. though given to ſecure a debt for which A. and B. were jointly liable. *Siffkin* v. *Walker*, 508
7. The preſentment of a bill of exchange for payment at the houſe of a merchant reſiding in London, at 8 o'clock in the evening of the day it becomes due, is ſufficient to charge the drawer. *Barclay* v. *Bailey*, 527
8. In an action againſt the maker of a promiſſory note expreſſed to be payable at a particular place, there is no neceſſity for proving that it was preſented there for payment *Nichols* v. *Bowes*, 498
9. Held by court of C. P. that if a bill of exchange be accepted payable at a particular place, in an action againſt the acceptor, the plaintiff muſt prove that it was preſented there for payment when it became due. *Callaghan* v. *Aylett*, 549
10. But ſubſequently determined in K. B. that it is no cauſe of demurrer to a declaration againſt the acceptor of a bill of exchange accepted payable at a particular place, that it does not allege that the bill was preſented there for payment. *Fenton* v. *Goundry*, 656
11. If a bill of exchange is accepted, "payable *at Meſſrs A. B. & Co*'s" who are bankers in the city of London, a preſentment

ſentment of the bill for payment to their clerks, at the *Clearing Houſe* is ſufficient. *Reynolds* v. *Chettle*, 596

12. Notice of the diſhonour of a bill of exchange muſt be given to the drawer and indorſers by the holder himſelf, or ſome perſon authorized by him. *Stewart* v. *Kennet*, 177

13. If the drawer or indorſer of a bill of exchange receives due notice of its diſhonour from any perſon who is a party to it, he is directly liable upon it to a ſubſequent indorſer from whom he had no notice of the diſhonour. *Jameſon* v. *Swinton*, 373

14. In an action by the *fourth*, againſt the *firſt* indorſee of a bill of exchange, all the parties to which reſided in London, it appeared that the plaintiff received notice of the diſhonour of the bill from his indorſee on the 20th of the month, and gave notice to his immediate indorſer, by a letter put into the two-penny poſt office on the evening of the 21ſt, but ſo late that it was not delivered out till the morning of the 22d. *Held*, that by this laches the plaintiff had diſcharged all the prior indorſers, although in the courſe of the 22d, notice of the diſhonour was given both to the *ſecond* indorſee and to the defendant. *Smith* v. *Mullett*, 208

15. It is not enough that the drawer or indorſer receives notice in as many days as there are ſubſequent indorſees, unleſs it is ſhewn that each indorſee gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorſers are diſcharged. *Marſh* v. *Maxwell*, 210 *n*

16. The holder of a bill of exchange is excuſed for not giving regular notice of its being diſhonoured to an indorſer, of whoſe place of reſidence he is ignorant, if he uſe reaſonable diligence to diſcover where the indorſer may be found. *Bateman* v. *Joſeph*, 461

17. The holder of a bill of exchange is excuſed for not giving notice of its diſhonour in the uſual time, by the day on which he ſhould regularly have given the notice being a public feſtival during which he is ſtrictly forbidden by his religion to attend to any ſecular affairs. *Lindo* v. *Unſworth*, 602

18. If the drawer of a bill of exchange when it is preſented for acceptance, has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they, without his privity, have appropriated the effects in their hands to the ſatisfaction of the debt; he is entitled to notice of the diſhonour of the bill for non-acceptance, as he might expect under theſe circumſtances that it would be accepted and paid. *Blackhan* v. *Doren*, 503

19. In an action on a bill of exchange, the plaintiff cannot be compelled to prove what conſideration he gave for it, by a mere notice that he will be required ſo to do, 596

20. In an action by the indorſee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what conſideration he gave for it. *Rees* v. *Marquis of Headfort*, 574

21. An averment in a declaration that *A. B.* & Co. accepted a bill of exchange according to the uſage and cuſtom of merchants, is ſupported by evidence that the bill was accepted by *C. D.* their authorized agent, thus: "*For A. B. & Co. C. D.*" *Heys* v. *Heſeltine*. (See VARIANCE, 3, 4, 5, 6.) 604

22. In an action againſt the drawer or indorſer of a bill of exchange diſhonoured for non payment after being accepted, although it be unneceſſary to ſtate the acceptance in the declaration, if it be ſtated, it muſt be proved;—but a promiſe to pay

after the bill was due, is a sufficient admiſſion of the acceptance, as well as of the hand-writing of the defendant himſelf and of the other parties to the bill. *Jones* v. *Morgan*, 474

25. Poſſeſſion is primâ facie evidence of property in negotiable inſtruments. Therefore, in trover for a bank note, it is not a primâ facie caſe for the plaintiff to prove, that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to ſhew his title to the note, without evidence from the other ſide that he got poſſeſſion of it malâ fide or without conſideration. *King* v. *Milſom*, 5

24. An action being brought againſt the acceptor of a bill of exchange, it is agreed between the parties, that the defendant ſhall pay the coſts, renew the bill, and give a warrant of attorney to ſecure the debt: The defendant gives the warrant of attorney, and renews the bill; but does not pay the coſts.—The plaintiff may bring a freſh action on the firſt bill, while the ſecond is outſtanding in the hands of an indorſee. *Norris* v. *Aylett*, 329

25. The holder of a bill of exchange, on its becoming due, allows the acceptor to renew it, without conſulting the indorſer; but the indorſer afterwards ſays to the acceptor, *it was the beſt thing that could be done*. This is not a recognition of the terms granted by the holder to the acceptor, and the indorſer is diſcharged. *Withall* v. *Maſterman*, 179

26. If the indorſee of a bill of exchange, having notice that it was accepted without conſideration, receive part payment from the drawer and give him time to pay the reſidue, he thereby diſcharges the acceptor. *Laxton* v. *Peat*, 185

27. If a bill of exchange is preſented for acceptance and not accepted, the drawer and indorſers are diſcharged by want of due notice of its being thus diſhonoured; although the holder preſents it for payment when due, and then gives them notice of its being diſhonoured both for non-acceptance and non-payment. *Roſcow* v. *Hardy*, 458

28. If the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reaſonable grounds to expect that the bill would be honoured, a proteſt is unneceſſary to charge the drawer. *Legge* v. *Thorpe*, 310

29. A notice of the diſhonour of a bill of exchange ſent by the two-penny poſt, is ſufficient where the parties live within the limits of the two-penny poſt, whether near or at a diſtance from one another; but the letter conveying the notice ſhould be proved to have been put into a receiving houſe at ſuch an hour that, according to the courſe of the two-penny poſt, it would be delivered the day on which the party to whom it is addreſſed was entitled to receive notice of the diſhonour of the bill. *Hilton* v. *Fairclough*, 633

30. In an action againſt the indorſer of a promiſſory note or bill of exchange, it is ſufficient evidence of preſentment for payment and notice of diſhonour, that the defendant promiſed abſolutely to pay the note or bill after it was due. *Taylor* v. *Jones*, 105

31. But if the drawer or indorſer after being arreſted, without acknowledging his liability, merely offers to give a bill, by way of compromiſe, for the ſum demanded, this does not obviate the neceſſity of proving notice. *Cuming* v. *French*, 106 *n*

32. In an action againſt the drawer of a foreign bill of exchange, a promiſe of payment by the defendant after the bill was due, is ſufficient evidence

of a proteſt for non-payment, and notice of the diſhonour of the bill. *Gibſon* v *Coggon*, 188

33. In an action againſt the indorſer of a bill of exchange, it is not neceſſary to prove any indorſements on the bill prior to the defendant's. *Critchlow* v. *Parry*, 182

34. The production of a bill of exchange from the cuſtody of the acceptor is not *primâ facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted. — Nor is payment to be preſumed from a receipt indorſed on the bill, unleſs this receipt is ſhewn to be in the hand-writing of a perſon entitled to demand payment. *Pfiel* v. *Van batenberg*, 439

35. In an action on a bill of exchange accepted for the price of goods purchaſed for exportation, the defendant cannot give in evidence that the goods were of a bad quality, and improperly packed, but is driven to his croſs-action. *Tye* v. *Gwynne* 346

BOND.

See BAIL BOND. COVERTURE, 1.

1. An action may be maintained upon a bond expreſſed to be a payable to a mercantile firm, by the perſons who actually conſtituted the firm when the bond was executed. *Moller* v. *Lambert*, 548

2. A bond of indemnity given to the truſtees of a public unincorporated inſurance company, conditioned for the good conduct of a clerk while in the ſervice of the *ſaid company*, remains in full force during the period the clerk continues to ſerve the company, although there be changes among the individual members of whom the company is compoſed. *Metcalfe* v. *Bruin*, 422

3. The recital in the condition of an indemnity bond, profeſſing to ſtate the agreement between the parties, does not confine the reſponſibility of the ſureties to the limits therein ſpecified. *Sanſom* v. *Bell*, 39

4. Indorſements on a bond acknowledging the receipt of intereſt or payment of part of the principal, are not evidence againſt the obligor to prove that the bond was on foot, without ſhewing that they were on the bond recently after their dates, and at a time when their purport was contrary to the intereſt of the obligee. *Roſe* v. *Bryant*, 321

BRICKS.

See ACTION, 8.

BRIDGE.

A particular pariſh was bound by preſcription to repair an old wooden foot-bridge, uſed by carriages only in times of flood. About 40 years ago the truſtees of the turnpike road built on the ſame ſite, a much wider bridge of brick, which has been conſtantly uſed ever ſince by all carriages paſſing that way.—Held that to an indictment againſt the county for not repairing this bridge, a plea that the pariſh had immemorially repaired and ſtill ought to repair the *ſaid bridge*, was not ſupported by evidence of the above facts; and that the burthen of repairing the new bridge muſt be borne by the county at large. *Rex* v. *Inhabitants of Surry*, 455

BROKER.

See PRINCIPAL AND AGENT. SALE.

CANDIDATE.

See ACTION, 10.

CARRIER.

See ACTION, 2.

1. A carrier places a board in his office, giving notice that he will not be anſwer-

answerable for *jewels, however small their value,* unless entered as such; but circulates hand-bills, stating generally, that he will not be answerable for any article *above the value of* 5*l.*, unless entered as such.—He is answerable for the loss of *jewels* not entered as such, if *under* the value of 5*l.* *Cobden* v. *Bolton*, 108

2. It is not sufficient notice to limit the common law responsibility of a carrier, for him to paste upon the door of his office where goods are received and delivered, a bill blazoning the advantages of his conveyances, and stating in small characters at the bottom of it, that he will not be answerable for goods above the value of 5*l.* unless entered as such and paid for accordingly. *Butler* v. *Heane*, 415

3. As soon as goods are delivered to a carrier they are at the risk of the purchaser, although the carrier be paid by the vendor. *King* v. *Meredith*, 639

CASE.

See PLEADING. TRESPASS.

CHEQUE.

See BANKERS, 1, 4. BILLS OF EXCHANGE.

1. If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter; this does not discharge the debtor, if the cheque is dishonoured; although the agent fails with a balance of his principal in his hands to a larger amount *Everet* v. *Collins*, 515

2. A cheque given for stock sold is lost by the vendor in going home from the Stock Exchange: The purchaser is immediately informed of this fact, but refuses to pay without an indemnity: Four monnths after, the bankers on whom the cheque was drawn stop payment, with sufficient money to answer it of the drawer's in their hands—*Held*, that under these circumstances an action would not lie for the price of the stock. *Bevan* v. *Hill*, 381

COACHMAKER.

See APPRENTICESHIP, 2.

COMPOSITION.

See ACTION, 6, 7.

CONCEALMENT.

See INSURANCE, 23.

CONTINUATION.

See USURY.

COPYRIGHT.

1. A musical composition published on a single sheet of paper, is privileged as *a book* within 8 Ann. c. 19. § 1. *Clementi* v. *Golding*, 25

2. A song composed to be sung at the Italian opera, remains the property of the composer. *Storace* v. *Longman*, 27 *n*

CORPORATION.

See NOTICE TO QUIT.

COVENANT.

See SHIP. TREES.

COVERTURE.

1. In an action of debt on bond, *coverture* is a good defence under a general plea of *non est factum*. *Lambert* v. *Atkins*, 272.

2. Under a plea of coverture, where it appeared that the defendant's husband went abroad 12 years ago, *Held*, that she was bound to prove that he was alive within 7 years. *Howell* v. *De Pinna*, 113

CRIM. CON.

an action for crim. con if the plaintiff's marriage was ſolemnized in a chapel, he muſt give ſome evidence that banns were uſually publiſhed there before the paſſing of the marriage act. But it is *prima facie* ſufficient for this purpoſe, to produce an old regiſter of marriages ſolemnized in the chapel before the paſſing of the marriage act, and a regular regiſter of banns publiſhed there ſince, and to prove that within the recollection of witneſſes who have attended the chapel, marriages have been ſolemnized and banns publiſhed in it from time to time of late years. *Taunton* v. *Wyborn*, 297

CROSS ACTION.

See ACTION, 4. BILLS OF EXCHANGE, 35.

CUSTOM.

There may be a valid cuſtom in a manor within the limits of an antient foreſt belonging to the crown, for the lord, with the aſſent of the homage, to grant parcels of the waſte to be held in ſeveralty by copy of court roll and incloſed, in excluſion of perſons having rights of common. *Boulcott* v. *Winmill*, 261

DATE.

See TIME.

DECEITFUL REPRESENTATION.

If A inquires generally of B. concerning circumſtances of C., A. cannot maintain an action againſt B. for a deceitful repreſentation upon this ſubject, if C. pays A. for the goods which it was in contemplation to ſell when the repreſentation was made, although C. becomes inſolvent, and is indebted to A. for other goods ſubſequently ſold.—*Aliter*, if A. had enquired of B. whether C. was worthy to be truſted as a general cuſtomer, or if there had been any conſpiracy between B. and C. to cheat A. by paying for the firſt parcel of goods. *De Graves* v. *Smith*, 533

DEER.

To ſupport an indictment on 42 G. 3. c. 107, for courſing deer in an incloſed ground, it is neceſſary, on the part of the proſecution, to call the owner of the deer to prove, that he did not give his conſent to the priſoner to courſe them. *Rex* v. *Rogers*, 654

DEMURRAGE.

See SHIP.

DISTRESS.

See TRESPASS, 3.

DOUBLE VALUE AND DOUBLE RENT.

1. Debt for double value on 4 Geo. 2. c. 28. does not lie againſt a weekly tenant. *Lloyd* v. *Roſbee*, 453
2. If tenant from year to year give his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable to an action on 11 Geo. 2. c. 19. for double rent. *Farrance* v *Elkington*, 591

EJECTMENT.

See NOTICE TO QUIT. TREES.

1. If a man gets into poſſeſſion of a houſe to be let, without the privity of the landlord, and they afterwards enter into a negociation for a leaſe, but differ upon the terms; the landlord may maintain ejectment to recover poſſeſſion of the premiſes, without giving any notice to quit. *Doe d. Knight* v. *Quigley*, 505

2. In

2. In an indenture of leaſe with a clauſe of re-entry, there is a general covenant on the part of the tenant to keep the premiſes in repair; and it is further ſtipulated by an independent covenant, that the tenant within three months from notice being ſerved upon him by the landlord, ſhall repair all defects ſpecified in the notice. The landlord after ſerving him with a notice, may *within the three months* bring an ejectment againſt him for a breach of the general covenant to repair. *Roe d. Goatly* v. *Paine*, 520

EVIDENCE.

See ATTORNEY. BANKRUPT. BILLS OF EXCHANGE. BOND. FOREIGN ATTACHMENT. INDICTMENT. INSURANCE. LIBEL.

1. The London Gazette is not evidence of the military appointments therein notified; but at the trial of an information againſt an officer in the army for falſe muſters, it is ſufficient to prove that he acted in the character mentioned in the information, without proving his commiſſion from the King. *Rex* v. *Gardner*, 513
2. On the trial of an indictment for a fraud againſt an agent of government under the controul of the Treaſury, a letter of inſtructions addreſſed to the defendant by the Lords of the Treaſury, may be read in evidence, without proving the commiſſion by which they were appointed. *Rex* v. *Jones*, 131
3. An advertiſement publiſhed in ſeveral daily newſpapers, is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading, one of the newſpapers in which it appeared. *Boydell* v. *Drummond*, 157
4. In an action againſt the ſheriff for not arreſting a perſon on meſne proceſs, notice of this perſon being within the defendant's bailiwick given to the underſheriff's agent in London, is no evidence of ſuch evidence to the defendant. *Gibbon* v. *Coggon*, 189
5. In an action by A. againſt B. for ſuing out a ſecond writ of *fieri facias* before the ſheriff had made any return to the firſt, the ſheriff's returns to the firſt and ſecond writs, ſtating that the execution was ſo conducted at A.'s requeſt and with his conſent, are *prima facie* evidence for B. againſt A. to ſupport a plea of licence. *Gyfford* v. *Woodgate*, 117.
6. A deed alleged in a plea to be loſt by time and accident, may be given in evidence, if having been loſt at the time of pleading it is found before trial. *Hawley* v. *Peacock*, 557.
7. A will of lands being loſt, the probate is not admiſſible as ſecondary evidence of its contents, *Doe* v. *Calvert*, 389
8. On proof that a will of lands had been loſt, parol evidence of its contents may be received from a witneſs who heard it read over before the teſtator's family on the day of his funeral. 390 *n*
9. Secondary evidence may be given of a written notice of the diſhonour of a bill of exchange, without notice to produce it. *Ackland* v. *Pearce*, 601
10. The ſentence of the Court of Admiralty condemning certain goods as captured from the enemy, is concluſive evidence that they were ſo captured, 228
11. If to an indictment for not repairing a highway againſt a pariſh conſiſting of three townſhips, viz. A. B. and C., there is a plea on the part of C., that each of the three townſhips has immemorially repaired its own highways ſeparately; the records of indictments againſt the pariſh generally, for not repairing highways ſituate in A. and B., with general pleas of *not guilty*,

guilty, and convictions thereupon, are *primâ facie* evidence to disprove the cuſtom for each townſhip to repair ſeparately; but evidence will be admitted that theſe pleas of *not guilty* were pleaded by inhabitants of A. and B. without the privity of the inhabitants of C. *Rex* v. *Eardiſland*, 494

12. In debt on bond conditioned for the performance of covenants, if the the condition is not ſet out in the pleadings, the plaintiff in executing a writ of inquiry under 8 & 9 W. 3. c. 11. muſt prove that the bond mentioned in the ſuggeſtion and produced to the jury, is that on which the action was brought. *Hodgkinſon* v. *Marſden*, 121

13. An act of parliament for regulating the concerns of the poor in a particular pariſh, requires that certain notice ſhall be given of a veſtry for the election of a treaſurer, and that a treaſurer ſhall be elected at a veſtry held in purſuance of ſuch notice —To ſupport an allegation in an indictment that "A. was *duly* elected treaſurer of the ſaid pariſh," an entry in the veſtry book, ſtating that A. was elected treaſurer *at a veſtry duly held in purſuance of notice*, is ſufficient evidence. *Rex* v. *Martin*. 100

14. Where an agreement not under ſeal is produced at the trial by one of the parties in purſuance of an undertaking to produce it, the oppoſite party, to make it evidence, muſt prove it in the ſame manner as if it had come from his own cuſtody. *Wetherſton* v. *Edgington*, 94

15. Where it is material for the defendant to ſhew that the action was commenced earlier than it appears to have been by the Niſi Prius record, the declaration delivered by the plaintiff is admiſſible evidence, *Harris* v. *Orme*, 497 *n*

16. If a copy of any document which itſelf is not evidence at common law, be made evidence by act of parliament, a copy muſt be produced, and the original is not made admiſſible evidence by implication. *Burdon* v. *Rickets*, 121 *n*

17. In an action for words of perjury, to ſhew the *quo animo*, the plaintiff may give in evidence a bill of indictment ſubſequently preferred by the defendant againſt him, and which the grand jury returned *ignoramus*. *Tate* v. *Humphrey*, 73 *n*

18. In replevin, the declarations of the perſon under whom the defendant makes cognizance, are not evidence for the plaintiff. *Hart* v *Horn*, 92

19. A licence is primâ facie evidence, that when a ſhip left her port of outfit, ſhe ſailed upon the voyage inſured. *Marſhall* v. *Packer*, 69

20. On proof that goods which cannot be exported without a licence, were entered for exportation at the cuſtom-houſe, it will be preſumed that there was a licence to export them. *Van Omeron* v. *Dowick*, 44

FACTOR.

See PRINCIPAL AND AGENT. SALE. SETT-OFF.

FOREIGN ATTACHMENT.

1 To prove that the defendant, under proceſs of foreign attachment, has paid a ſum of money to a creditor of the plaintiff, the record of the cauſe in the Mayor's Court, with an entry of ſatisfaction, is concluſive evidence. *Huxham* v. *Smith*, 19

2. The record is only primâ facie evidence that the debt for which the action was brought in the Mayor's Court, aroſe within the limits of the city. *Ib.* 19

3. If a merchant abroad orders goods of a ſhop-keeper reſiding within the city of London, to be put on board a ſhip

a ſhip lying beyond the limits of the city, and the ſhop-keeper ſends them from his ſhop to be ſhipped in purſuance of the order, the price of the goods may be ſued for in the Mayor's Court as a debt ariſing within the city, *Ib.* 21

FOREIGN JUDGMENT.

1. An action may be maintained upon a foreign judgment obtained by default, which ſtates that the defendant appeared by attorney,—without proving that the attorney mentioned had authority to appear, or that the defendant was living within the juriſdiction of the foreign Court. *Molony* v. *Gibbons*, 502

FOREIGN SENTENCE.

See INSURANCE.

The ſentence of condemnation of a foreign court of Admiralty cannot be received in evidence, without previous proof of the ſhip having been captured. *Marſhall* v. *Parker*, 69

FRAUDS, STATUTE OF.

See PRINCIPAL AND AGENT, 3.

1. A memorandum of the ſale of goods under the 17th ſection of the ſtatute of frauds, cannot be ſigned by one of the contracting parties as the authorized agent of the other: the agent muſt be a third perſon. *Wright* v. *Dannah*, 203

2. A tenancy from year to year created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premiſes accordingly. *Mollett* v. *Brayne*. 97

FREIGHT.

See SHIP.

1. *Freight* cannot be recovered on a charter-party, unleſs the ſtipulated voyage has been actually performed; and there is no implied promiſe to pay a *compenſation* for carrying goods a part of the voyage, unleſs they are voluntarily accepted at a place ſhort of the port of deſtination. *Oſgood* v. *Groning*, 466

2. If by a bill of lading goods are made deliverable to A. or his aſſigns, he or they paying freight for the ſame, and A. aſſigns the bill of lading to B. and B. aſſigns it to C., who accepts the goods under it, C. is liable to an action for the freight at the ſuit of the maſter of the ſhip. *Cock* v. *Taylor*, 587

3. A ſhip let to freight by the month in attempting to enter a blockaded port by order of the freighters, is ſeized, and her cargo condemned; but being afterwards releaſed, takes in other goods and delivers them to the freighters, according to the charter-party: *Held*, that there was no ſuſpenſion of the freight during the detention of the ſhip. *Moorſom* v. *Greaves*, 627

GAZETTE.

See EVIDENCE 1.

GUARANTIE.

See BILLS OF EXCHANGE, 5.

1. If *B.* by a written guarantie undertake to *A.* to *anſwer for the payment of goods* to be ſent by him to *C.*, *A.* cannot maintain *indebitatus aſſumpſit* againſt *B.* for the price of goods ſent to *C.* accordingly, but muſt declare ſpecially on the guarantie. *Mines* v. *Scalthorpe*. 215.

2. Where by a written guarantie, A. becomes bound to B. for any debt C. may contract with him, not exceeding 100l. the guarantie is not extinguiſhed by one dealing between B. and C. to that amount; but extends to any debt of 100l. which C. may after-

afterwards owe to B. *Merle* v. *Wells*, 413
3. A guarantie for the payment of any goods to be ſupplied to a third perſon to a ſpecified amount, remains in force after goods to this amount have been ſupplied and regularly paid for, until the ſurety gives notice that he will be no longer reſponſible. *Maſon* v. *Pritchard*, 436

HAWKER.

A licenſed hawker who gives his licence to be uſed by his ſervant employed to ſell goods on his account, is not liable on 29 G. 3. c. 26. as for *letting* to *hire* or *lending* the licence. *Hodgſon q. t.* v. *Flower*, 288

HERALD.

1. *Windſor Herald* and *Blue Mantle Purſuivant at Arms* may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order for it was given, although only one of them was applied to by the defendant. *Townſend* v. *Neale*, 190
2. In ſuch an action the plaintiffs are bound to give general evidence of the pedigree being true, unleſs this has been diſpenſed with by the defendant, *Ib.* 191

HIGHWAY.

See EVIDENCE, 11.

HORSE.

1. *Rearing* is not unſoundneſs in a horſe, unleſs it be ſhewn to proceed from ſome diſeaſe or organic defect, *Baſſet* v. *Collis*, 523
2. A ſervant employed to ſell a horſe and receive the price, has an implied authority to warrant the horſe to be ſound; and in an action upon the warranty, it is enough to prove that it was given by the ſervant, without calling him, or ſhewing that he had any ſpecial authority for that purpoſe. *Alexander* v. *Gibſon*, 555
3. In an action on the warranty of a horſe, the plaintiff is not entitled to recover for the expence of keeping the horſe, unleſs, on diſcovering the unſoundneſs, he offered to return him to the defendant. *Caſwell* v. *Coare*, 82

INDEBUTATUS ASSUMPSIT.

See ACTION, 10.

GUARANTIE.

INDICTMENT.

See EVIDENCE, 11.

1. An indictment will not lie for words ſpoken of a juſtice of the peace in his his abſence. *Rex* v. *Weltje*, 142
2. A conſpiracy to obtain money by procuring from the Lords of the Treaſury the appointment of a perſon to an office in the cuſtoms, is a miſdemeanor at common law. *Rex* v. *Pollman*, 229
3. It is an indictable offence for a man to undreſs himſelf on the beach and to bathe in the ſea, near inhabited houſes, from which he may be diſtinctly ſeen; although theſe houſes may have been recently erected, and till then it may have been uſual for men to bathe in great numbers at the place in queſtion. *Rex* v. *Crunden*, 89
4. If an overſeer of the poor receive from the putative father of baſtard child born within the pariſh, a ſum of money as a compoſition with the pariſh for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this ſum in his accounts with the pariſh. *Rex* v. *Martin*, 268
5. If a banker permits a ſum of money to

to be lodged at his houſe, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conſpiracy along with thoſe who are to procure the appointment and to receive the money. *Rex* v. *Pollman*, 233

6. An indictment againſt a maſter for not providing ſufficient food and ſuſtenance for a ſervant, whereby the ſervant became ſick and emaciated, muſt allege that the *ſervant was of tender years, and under the dominion and controul of the maſter*. *Rex* v. *Ridley*, 650

7. An indictment againſt A, B, C, and D. charged, that they conſpired together to obtain, "viz. to the uſe of them the ſaid A, B., and C. and certain other perſons to the jurors unknown," a ſum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that *C.* was to have any part of it, or was at all implicated in the tranſaction. *Held*, that the averment concerning the application of the money was material, though coming under a *viz.* and that as to D. the conſpiracy was not proved as laid. *Rex* v. *Pollman*, 231

8. There is no objection of any ſort to trying a man, upon one indictment, for ſeveral diſtinct miſdemeanours of the ſame nature. *Rex* v. *Jones*, 131

9. A perſon indicted for a miſdemeanour or a felony, may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex* v. *Jones*, 132

10. The defendant may be found guilty upon a count in an information which charges him with having *compoſed*, printed, and publiſhed" a libel, if he is proved to have *publiſhed* without having *compoſed* it. *Rex* v. *Hunt*, 583

11. If the defendant is charged by a count in an indictment with having "compoſed, *printed* and publiſhed" a libel, if the evidence be, that he only compoſed and publiſhed it, he may be found guilty of the *compoſing* and *publiſhing*, and acquitted of the *printing*. *King* v. *Williams*, 646

INFORMATION.

See INDICTMENT.

INSOLVENT DEBTORS ACT.

After the 1ſt day of February 1809, a promiſſory note was given for an antecent debt. *Held*, that as againſt the payee, the maker would have been diſcharged under the inſolvent debtors act, 49 Geo. III. c. 115; but that he was not, as againſt a perſon to whom the note was ſubſequently indorſed. *Lucas* v. *Winton*, 443

INSURANCE.

See EVIDENCE. FOREIGN SENTENCE.

1. The captors of property in a conjunct expedition by the navy and army, againſt a fortreſs on the land, ſince 45 G. 3. c. 72. have an inſurable intereſt before condemnation. *Stirling* v. *Vaughan*, 225

2. A policy of inſurance on *money lent to the Captain payable out of the freight* is illegal and the premium cannot be recovered back from the underwriters. *Wilſon* v. *R. E. Aſſ. Co.* 626

3. Policy *at and from the Iſland of St. Michael's*. The ſhip arrived there in a very diſabled ſtate, and after lying at anchor above 24 hours in great danger from a ſtorm, was blown out to ſea and wrecked. — *Held* that the policy on the homeward voyage never attached. *Parmater* v. *Couſins*, 235

4. Policy

4. Policy from London to a foreign port, "on goods as ſhould thereafter be declared, each package to pay average, the ſame as if it were ſeparately inſured." A ſmall quantity of *naval ſtores* was afterwards mentioned in the ſpecification of intereſt, and exported in the veſſel with the other goods inſured, without a licence, contrary to a proclamation authorized by 33 G. 3. c. 2. *Held*, that the policy was entirely vitiated, and that the aſſured could not recover for that part of the goods the exportation of which was legal. *Parkin* v. *Dick*, 221

5. A voyage to a Pruſſian port is not illegal as being a trading with an enemy, although our commerce is entirely excluded from the ports of Pruſſia, and there be no diplomatic intercourſe between the two countries. *Muller* v. *Thompſon*. 610

6. A policy of inſurance is not vitiated by giving leave to the ſhip to proceed to any port in a particular ſea in which there are both hoſtile and neutral ports, unleſs it can be ſhewn that it was intended the ſhip ſhould in fact proceed to one of the former. *Ib.*

7. An inſurance is declared to be "on "the cargo, *being* 1031 *hhds. wine*." This does not amount to a warranty that the wine conſtitutes the whole cargo, and that no other goods ſhall be taken on board. *Ib.*

8. Policy at and from Riga to the United Kingdom, on ſhip and freight, declared to be *in continuation* of two other policies, which were on ſhip and freight on a voyage from the United Kingdom to the ſhip's port of diſcharge in the Baltic, during her ſtay there, and from thence back to her port of diſcharge in the United Kingdom. The ſhip was ſeized and condemned at Riga before ſhe had diſcharged her outward cargo. *Held* that the firſt policy could not be applied to the outward freight. *Bell* v. *Bell*, 475

9. It is ſtipulated by a policy of inſurance from Riga to the United Kingdom, "that if the ſhip ſhould not load a cargo at Riga by any act of the Ruſſian government, the aſſured were to receive a total loſs." The ſhip is ſeized and condemned by the Ruſſian government before her outward cargo is diſcharged. — This is a total loſs within the meaning of the policy. *Ib.*

10. A policy at and from a foreign port, attaches when the ſhip has arrived there in good phyſical ſafety, although, from political cauſes, ſhe may be in great danger of condemnation, *Ib.*

11. Policy "at and from *Sheerneſs* in ballaſt to *Charente*, and back to a port in the Britiſh Channel and London; from the date thereof, till the ſhip ſhould be arrived at *Charente* and back at a port in the Channel and London; on *freight* valued at the ſum inſured, to be deemed intereſt in the outward voyage, altho' in ballaſt." The ſhip was freighted for the voyage in queſtion by a charter-party, whereby ſhe was to proceed to *Charente* in ballaſt, and there the freighter was to provide her with a full cargo of brandy. On the arrival of the ſhip at *Charente* ſhe was put under an embargo, and after being ſo kept for ſix months, ſhe was ſeized and condemned by the French government.— *Held*, that the freight was protected by the policy while the ſhip lay at *Charente* before any goods were put on board, and that the underwriters were liable for a loſs ſo happening. *Mackenzie* v. *Shedden*, 431

12. If a ſhip inſured, on arriving off her port of deſtination, is prevented from entering it, from its being in the hands of the enemy, or from being

being ordered away by the Engliſh commander there, the policy does not remain in force till ſhe reaches a port of ſafety. *Parkin* v. *Tunno*, 59

13. Goods inſured to *A.*, that port being in the hands of the enemy, are carried to *B.* and afterwards to *C.* Their condition being here inſpected for the firſt time from the original ſailing of the ſhip, they are found to be almoſt entirely deſtroyed by ſea-damage, which might have happened partly in the voyage to *A.* or entirely in paſſing from *A.* to *C.* The underwriters are not liable for any part of this loſs, there being no diſtinct evidence that the goods were injured while they were protected by the policy. 59

14. In an action on a policy from an Engliſh to a foreign port, to found a preſumption that the ſhip was loſt on the voyage, it is enough to prove that ſhe was not heard of in this country after ſhe ſailed, without calling witneſſes from her port of deſtination, to ſhew that ſhe never arrived there. *Twemloe* v. *Oſwin*, 85

15. In an action on a policy of inſurance, where a loſs by the perils of the ſea is to be inferred from the ſhip not being heard of after her ſailing, the plaintiff muſt prove that when ſhe left the port of outfit ſhe was bound upon the voyage inſured. For this purpoſe the *convoy bond*, mentioning the port of deſtination in the common form, is *prima facie* evidence. *Cohen* v. *Hinckley*, 51

16. The *Royal Exchange Aſſurance Company* is liable for *a total loſs* upon a cargo of corn, where the ſhip from the perils inſured againſt, becomes incapable of purſuing the voyage, and another veſſel cannot be procured to forward the corn to its port of deſtination. *Wilſon* v. *R. E. Aſs. Co.* 623

17. Where a ſhip is obliged to put back, and the damage ſhe has ſuſtained is of ſuch a nature that ſhe cannot purſue her voyage, and other ſhips cannot be procured to take the cargo, this is a *total loſs* of ſhip, cargo and freight, however inconſiderable the damage ſuſtained may be, becauſe the voyage in contemplation is loſt. *Manning* v. *Newnham*, 624 *n*

18. The owner of a cargo of flax-ſeed inſured "at and from America to Limerick," himſelf reſiding at that place, on the 11th February 1808, received information that the ſhip with the flax-ſeed on board had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th of June following. The flax-ſeed was intended for ſowing, and might have been employed for that purpoſe, had it arrived before the 10th of May, but afterwards would have been ſcarcely of any value. *Held*, that however the plaintiff might have waited till the 10th of May before abandoning, the abandonment on the 11th of June was out of time. *Kelly* v. *Walton*, 155

19. Goods protected by a valued police, being captured, are condemned as lawful prize, *the captors paying the freight*. The aſſured may nevertheleſs recover as for a total loſs. *Marſhall* v. *Parker*, 69

20. If a ſhip inſured is merely *repreſented* as neutral, a ſentence of a foreign court of admiralty, condemning her for a violation of the laws of neutrality, is not evidence to falſify the *repreſentation*. *Von Tungeln* v. *Du Bois*, 151

21. A repreſentation made to any underwriter except the firſt on the policy, is not to be conſidered as made to ſubſequent underwriters. *Bell* v. *Carſtairs*, 543

22. The maſter of a merchantman while taking in his loading at a foreign

reign port, is ordered by the captain of a King's ſhip to go out to ſea to examine a ſtrange ſail diſcovered in the offing, bearing enemies' colours: Without remonſtrating, and without any force or threats being employed to influence his determination, he obeys; and finding the ſtrange ſail to be a neutral, he returns to port. *Held*, that this was an unexcuſed deviation, which vacated a policy on goods on board the merchantman. *Phelps* v. *Auldjo*, 350

23. The aſſured on a policy at and from Riga, are in poſſeſſion of a letter from their correſpondent there, ſtating that an order for ſending the papers of all ſhips arriving at that port to Peterſburg had produced a great ſenſation, intimating that the papers of the ſhip inſured had been ſent to Peterſburgh accordingly, and expreſſing conſiderable apprehenſions for her ſafety. This letter is not communicated to the underwriters; but the broker informs them of the fact of the ſhip's papers being ſent to Peterſburgh. *Held*, that the policy was not vitiated on the ground of concealment by the non-communication of the letter. *Bell* v. *Bell*, 479

24. When a ſhip inſured is captured in a voyage to an enemy's country, and the Britiſh licence legalizing the voyage is loſt, to ſhew that ſhe had ſuch a licence, it is neceſſary to prove the loſs of the paper purporting to be a licence put on board the ſhip, and to produce examined copies of the order in council for granting the licence, and of the copy of the li- preſerved in the ſecretary of ſtate's office. *Eyre* v. *Palſgrave*, 605

25. If in a policy of inſurance "at and from Surinam, and all or any of the Weſt India Iſlands to London," the ſhip is warranted to ſail *on or before the 1ſt of Auguſt*, it is a ſufficient compliance with the warranty if ſhe ſail on or before that day from her final port of loading on the homeward voyage, although ſhe afterwards touch at one of the Weſt India iſlands to join convoy. *Wright* v. *Shiffner*. 247

26. A warranty in a policy of inſurance againſt *capture in port* does not protect the underwriters from a loſs happening by capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. Therefore where a ſhip inſured from *Rotterdam* to *London*, and "warranted free from capture in port," was captured while lying at anchor near *Ghoree* in the River *Maes*, the underwriters were held liable. *Baring* v. *Vaux*, 541

27. If by a policy of inſurance the ſhip is warranted "free of capture and ſeizure in her port or ports of diſcharge," and ſhe is taken in an open river not within the limits of any regular port, waiting for an opportunity there to diſcharge her cargo in a clandeſtine manner, the place where ſhe is taken is to be conſidered her port of diſcharge within the meaning of the policy, and the underwriters are not liable for the loſs. *Jarman* v. *Coape*, 613

28. *Semble*, that if a declaration on a policy of inſurance lay the loſs *by the perils of the ſeas*, the plaintiff may recover, upon proof that the ſhip was wrecked, although this may have been occaſioned by the *barratry* of the maſter or mariners. *Heyman* v. *Pariſh*, 149

29. A count on a policy of inſurance laying the loſs by *capture*, is ſuſtained by evidence, that the ſhip was captured by a privateer, although this happened from a colluſion between the maſter of the ſhip and the commander of the privateer, and the plaintiff

plaintiff might have recovered under a count laying the loſs by the *barratry* of the maſter. *Arcangelo* v. *Thompſon*, 620

30. To prove a warranty, that a ſhip inſured was of a particular nation, it is *primâ facie* evidence, that ſhe carried the flag of that nation at times when ſhe was free from all danger of capture, and that the captain addreſſed himſelf to the conſul of that nation in a foreign port. *Ib.*

31. The production of a letter dated abroad, and addreſſed to J. S. in England, with the Engliſh ſhip letter poſt-mark upon it, which directed a policy to be effected, is ſufficient to prove that J. S. was "the perſon reſiding in Great Britain, who received the order for and effected ſuch policy." *Ib.*

INSURANCE BROKER.

See LIEN, 1, 2. PRINCIPAL AND AGENT. SET OFF.

INTEREST.

See BANKERS, 2.

1. In an action for money had and received to recover a ſum paid by a third perſon into the defendant's hands for the plaintiff's uſe, the plaintiff is not entitled to intereſt. *De Bernales* v. *Fuller*, 462

The rule upon this ſubject in *De Havilland* v. *Bowerbank*, 1 *Campb.* 50. confirmed by the Court of K. B. *Ib.*

2. In the Exchequer Chamber intereſt will be allowed in an action for not giving a bill of exchange in payment of goods ſold, from the time when the bill, if given, would have become due. *Becher* v. *Jones*, 428 *n.*

3. When goods are ſold to be paid for by a bill of exchange, and the purchaſer neglects to give the bill, the vendor is entitled to intereſt from the time the bill, if given, would have become due. *Porter* v. *Palſgrave*, 472

4. Whether the defendant has or has not accepted the goods. *Boyce* v. *Warburton*, 480

5. But where there was no agreement to give a bill, intereſt ought not to be allowed in an action for goods ſold and delivered, to be paid for at a certain day. *Gordon* v. *Swan*, 429*n*

LANDLORD AND TENANT.

See EJECTMENT. FRAUDS, STATUTE OF. NOTICE TO QUIT. TREES. USE AND OCCUPATION.

LEASE.

If an inſtrument profeſſing to be an agreement for a leaſe, when taken altogether, appears intended to transfer poſſeſſion and a preſent intereſt in the premiſes to the tenant, it will be treated as a leaſe, although it contain a ſtipulation for ſubſequently executing a leaſe under ſeal. *Poole* v. *Bentley*, 286

LIBEL.

See INDICTMENT, 10, 11.

1. It is libellous to publiſh the preliminary examinations taken *ex parte* before a magiſtrate previous to committing a man for trial or holding him to bail for an offence with which he charged; the tendency of ſuch a publication being to prejudice the minds of jurymen againſt the accuſed, and to deprive him of a fair trial. *Rex* v. *Fiſher*, 563

2. It is not libellous for a writer who allows the Sovereign to be ſolicitous for the welfare of his ſubjects, and who has no intention of calumniating him or of bringing his perſonal government into public odium, to expreſs regret that he has taken an erroneous view of any queſtion of foreign or domeſtic policy. *Rex* v. *Lambert*, 398

3. On the trial of an information for a libel in a newſpaper, the defendant has a right to have read in evidence any extract from the ſame paper connected with the ſubject of the paſſage charged as libellous, although diſjointed from it by extraneous matter and printed in a different character. *Rex* v. *Lambert*, 398

4. It is not a bar to an action for a libel, that the plaintiff has been in the habit of libelling the defendant. *Finnerty* v. *Tipper*, 76

5. In an action for a libel, the plaintiff cannot give in evidence other libels publiſhed concerning him by the defendant, unleſs they directly refer to the libel ſet out in the declaration. *Finnerty* v. *Tipper*, 92

6. In an action for a libel, the defendant, under the general iſſue, may prove, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally ſuſpected to be guilty of the crime thereby imputed to him, and that on account of this ſuſpicion, his relations and acquaintance had ceaſed to aſſociate with him. *Earl of Leiceſter* v. *Walter*, 251

7. Q. Whether action will lie for deſtroying a libellous picture? *Du Boſt* v. *Beresford*, 511

LICENCE.

See ALIEN ENEMY. EVIDENCE, 10, 20. INSURANCE, 24.

LIEN.

1. *A.*, a merchant, at different time, employs *C.*, an inſurance broker, to effect policies of inſurance for him: *C.*, without *A.*'s concurrence, employs *B.*, another inſurance broker, to effect theſe policies, informing him that they were for a correſpondent in the country: *B* gets the policies effected in *A.*'s name, and delivers them all, except one, to *C.* becomes bankrupt, without having paid *B.* any part of the premiums, and *A.* being indebted to his eſtate beyond the amount. — *Held*, that *B.* had not a lien on the policy he detained for the general balance due to him from *C.*, and that *A* could maintain trover for this policy againſt *B.*, after tendering him the premiums and commiſſion due in reſpect of it alone. *Snook* v. *Davidſon*, 218

2. If an agent, employed to effect an inſurance on goods, repreſents himſelf as the owner of the goods to another perſon whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent *Lanyon* v. *Blanchard*, 597

3. The maſter of a ſhip has a lien on the luggage of a paſſenger for his paſſage-money. *Wolf* v. *Summers*, 631

LIMITATIONS, STATUTE OF.

1. If a cauſe of action ariſing from the breach of a contract to do an act at a ſpecific time, is once barred by the ſtatute of limitations, a ſubſequent acknowledgment by the party, that he broke the contract, will not take the caſe out of the ſtatute. *Boydell* v. *Drummond*, 160

LONDON DOCKS.

See SHIP, 1, 2, 3.

LOST BILL.

See BILLS OF EXCHANGE, 1, 2.

MALICIOUS ARREST.

An action cannot be maintained for a malicious arreſt by *A.* againſt *B.* if *A.* owed *B.* the ſum for which he was held to bail, although *B.* was indebted to *A.* to a larger amount. *Brown* v. *Pigeon*, 594

MALICIOUS PROSECUTION.
See VARIANCE, 1.

MARKET OVERT.
See SALE, 3.

MISDEMEANOR.
See INDICTMENT.

MISNOMER.
See BAIL BOND, 2.

MONEY HAD AND RECEIVED.
See ASSUMPSIT IMPLIED, 1.

1. *A* residing at X. employs *B.* residing at Y. to procure payment of a bill there, and to remit the produce direct to him at X — *B.* receives payment of the bill, but remits the produce to a third person at Z. for *A.*'s use, whereby the whole gets into the hands of *A.*'s creditors. *A.* cannot maintain an action for money had and received against *B.* to recover the amount of the sum received in payment of the bill. *Duncan* v. *Skipwith*, 68
2. If goods are delivered generically of the sort ordered, the price cannot be recovered back in an action for money had and received as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use. *Fortune* v. *Lingham*, 416

NEUTRAL.
See ACTION, 3.

NOTICE OF ACTION.
A notice to magistrates under 24 G. 2. c. 44. need not specify *the form of action* to be brought. It is sufficient if it states the writ or process, and the *cause of action*. *Sabin* v. *De Burgh*, 196

NOTICE TO PRODUCE.
See EVIDENCE, 9, 14.

NOTICE TO QUIT.
See EJECTMENT.

1. If a tenant from year to year hold from *Old Michaelmas*, a notice to quit "*at Michaelmas*" generally, is good. *Doe* v. *Vince*, 257
2. If an ejectment by a corporation against a tenant from year to year, a notice to quit given by a person acting as steward of the corporation, is sufficient, without evidence that he had an authority under seal from the corporation for this purpose. *Roe* v. *Pierce*, 96
3. If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit expiring at the end of the first year. *Thompson* v. *Maberley*, 573
4. Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waived. *Doe* v. *Calvert*, 386
5. Premises are let from year to year, upon an agreement, that either party may determine the tenancy by a *quarter's notice*. This notice must expire at that period of the year when the tenancy commenced. *Doe d. Pitcher* v. *Donovan*, 78
6. A notice was given on the 22d of *March* by a landlord to his tenant to quit at the expiration of the current year. A declaration in ejectment laying the demise on the 1st of November, was on the 16th of January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself. This held to be *primâ facie* evidence,

that the tenancy commenced at Michaelmas and was determined before the day of the demiſe. *Doe d Baker* v. *Woombevell*, 559

7. A notice to quit is not of itſelf *primâ facie* evidence of the period of the year when the tenancy commenced. *Doe* v. *Calvert*, 388

8. But if a notice to quit is ſerved perſonally on the tenant in poſſeſſion, and he makes no objection to it, this is primâ facie evidence to be left to the jury, that the tenancy commenced at the ſeaſon of the year when the notice to quit expired. *Thomas* v. *Thomas*, 647

NOTICE OF TRIAL.

See PRACTICE, 5.

O. P.

See THEATRE.

PARISH.

See VENUE.

1. The pariſhes of A. and of B. being united by act of parliament for the maintenance of their poor, but for no other purpoſe;—it is a fatal miſdeſcription in ejectment, to ſtate premiſes which are actually within the pariſh of A. as ſituate in the *united pariſhes of* A. *and* B. *Goodtitle* v. *Lammiman*, 274

2. In treſpaſs *quare clauſum fregit*, where the locus in quo is ſtated to be *in the pariſh of A.* it is enough if *A.* has a church and overſeers of its own, and is reputed a pariſh, although perhaps ſtrictly ſpeaking it may be only a hamlet, 5 *n*

PARTICULAR OF DEMAND

See PRACTICE 3.

PARTNERS.

See BILLS OF EXCHANGE.

1. A father eſtabliſhed in buſineſs, on his ſon's coming of age, tells him he ſhall have *a ſhare* in it, and holds him out to the world as his co-partner: The ſon acts as ſuch for ſeveral years; but there is never any thing ſettled as to the particular ſhare which he ſhall have.—Under theſe circumſtances, the law will conſider that there was a partnerſhip between the parties themſelves, as well as with reſpect to ſtrangers; but not that the ſon is entitled to a moiety of the profits; and it will be referred to a jury to ſay, to what ſhare he is reaſonably entitled. *Peacock* v. *Peacock*, 45

2. A merchant carrying on trade on his own ſeparate account, introduces into his *firm* the name of a clerk who has no participation in profits or loſs, but continues to receive a fixed ſalary. *Held* then in an action on a bill of exchange payable to the order of this *firm*, the clerk muſt be joined as a plaintiff. *Guidon* v. *Robſon*, 302

3. If one of ſeveral partners promiſes individually to pay a debt, he will not be allowed to ſhew that it was due jointly from himſelf and his co-partners. *Murray* v. *Somerville*, 99 *n*

4. If A. and B. are in partnerſhip, and C. owes them a ſum of money on the partnerſhip account, a receipt for this given by A. upon ſetting off a private debt due from himſelf to C. will be a bar to an action by A. and B againſt C, for the debt due to the partnerſhip; but, if after a diſſolution of partnerſhip between A and B, and a notice in the Gazette that all debts due to the partnerſhip ſhall ſhall be paid to B. A. colluſively gives C. a receipt for the debt, dated anterior to the diſſolution of the partnerſhip, the receipt is void, and an action may ſtill be maintained againſt C. for the debt, in the names of A. and B. *Henderſon* v. *Wild*, 561

5. If

5. If after a diſſolution of partnerſhip, and notice of this publiſhed in the London Gazette, and ſet round to the cuſtomers of the houſe, one of the partners carries on the buſineſs under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction againſt his doing ſo, and are not liable upon ſuch bills to a perſon ignorant of the diſſolution of partnerſhip. *Newſome* v. *Coles*, 617

6. There is an agreement between A. B. and C., the proprietors of a ſtage coach, who divide the general profits of the concern, that they ſhall each work the coach a ſtage with horſes, their ſeparate property, and maintained reſpectively at their ſeparate expence.—Held at N. P. that B. and C. were jointly liable as co-partners with A. for the price of hay furniſhed at A.'s requeſt for the uſe of the horſes which were his ſeparate property, but were kept by him for the purpoſe of working the coach the ſtage allotted to him under the agreement. *Barton* v. *Harriſon*, 97. Over-ruled by the court of C. P. who granted a new trial. 2 *Taunt.* 49

PATENT.

See TIME.

PAYMENT OF MONEY INTO COURT.

In *indebitatus aſſumpſit* for goods ſold, payment of money into court after *a particular* ſtating that the action is brought for the price of a certain lot of goods ſold to the defendant on ſuch a day by A. B. the plaintiff's broker, does not admit that the goods purchaſed by the defendant of A. B. on the day ſpecified, were the property of the plaintiff. *Blackburn* v. *Scholes*, 341

In an action of covenant, if money be paid into court on any one of the breaches, it is unneceſſary to prove the deed. *Randall* v. *Lynch*, 356

PENALTIES.

See APPRENTICESHIP. HAWKER. USURY.

PERJURY.

1. If a count in an indictment for perjury undertake to ſet out continuouſly the *ſubſtance and effect* of what the defendant ſwore when examined as a witneſs; it is neceſſary, in ſupport of this count, to prove, that in *ſubſtance and effect* he ſwore the whole of that which is thus ſet out as his evidence, although the count contains ſeveral diſtinct aſſignments of perjury. *Rex.* v. *Leeſe*, 134

2. In an indictment for perjury before a ſelect committee of the Houſe of Commons, it was averred, that an election was had for a borough "*by virtue of a certain precept of the high ſheriff of the county by him duly iſſued to the bailiff of the ſaid borough of N. M.*" Held, that this was not a deſcription of the precept, and that although the borough was therein differently denominated, the variance was immaterial. *Rex.* v. *Leeſe*, 139

3. But the indictment having ſtated that "*A. B.* and *C. D.* were returned to ſerve as burgeſſes for the ſaid borough of *N. M.*" this was conſidered a deſcription of the indenture of return, and the borough being therein ſtyled the borough of *M.* the variance was held fatal, *ib.* 141

4. In an indictment for perjury in an anſwer to a bill in Chancery, the Bill was ſtated to have been filed by A. againſt B. (the now defendant) *and another*. In fact it was filed againſt B. C. and D., but the perjury was aſſigned on a part of the anſwer which

was material between A. and B.—This held not to be a fatal variance, *Ib.*

5. On an indictment for perjury in an anſwer to a bill in Chancery it is ſufficient evidence of the defendant having ſworn to the truth of the anſwer, to prove his ſignature to it, and the ſignature of the Maſter in Chancery before whom it purports to be ſworn. *Rex.* v. *Benſon*, 508

PHYSICIAN.

If a medical practitioner paſſes himſelf off as a phyſician, although he has no diploma, and no right to aſſume that character, he cannot maintain an action for his fees. *Lipſcombe* v. *Holmes*, 441

PLEADING.

See BILLS OF EXCHANGE 10. GUARANTIE. INSURANCE, 28, 29. MONEY HAD AND RECEIVED, 1.

1. To treſpaſs for breaking and entering a houſe and ſtaying therein three week, the defendant pleads a juſtification as to breaking and entering and ſtaying in the houſe 24 hours. The plea covers the whole declaration. *Montriſaft* v. *Smith*, 175

2. Q. If to treſpaſs for deſtroying a picture, the defendant may plead, that it was a ſcandalous libel upon individuals, and that being publickly exhibited, he cut it to pieces by way of abating a nuiſance? *Du Boſt* v. *Beresford*, 511

3. A writ directed generally to the ſheriff of a county, may be deſcribed in pleading as directed to the individual by name, who was in fact ſheriff of the county when the writ iſſued. *Batchelor* v. *Salmon*, 525

4. An action brought to recover a particular ſum of money, may be deſcribed in pleading "as an action for "the recovering of the ſaid ſum of "money", although in form it was an action of *trover*, 526

5. If to treſpaſs by a tenant againſt a landlord for turning him out of poſſeſſion, the defendant pleads a fact by which the leaſe was forfeited, and the plaintiff replies generally *de injuria*; when the fact is proved by which the leaſe was forfeited, the plaintiff cannot give in evidence a waiver of the forfeiture; but he ought to have replied this ſpecially in avoidance of the plea. *Warral* v. *Clare*. 629

POLICY.

See INSURANCE.

PRACTICE.

1. When there are ſeveral counſel on the ſame ſide, and a junior has begun to examine a witneſs, the leader may interpoſe, take the witneſs into his own hands, and finiſh the examination. But after one counſel has brought his examination to a cloſe, a queſtion cannot regularly be put to the witneſs by another counſel on the ſame ſide. *Doe* v. *Roe*. 280

2. Counſel, although retained for the plaintiff, cannot withdraw the record till a brief is delivered. *Abitbol* v. *Beneditto*, 487

3. Where an action is brought to recover the balance of an account, a particular of the plaintiff's demand delivered under a judge's order ought to give the defendant credit for payments admitted to have been made by him, and to ſtate the exact ſum which the plaintiff goes for. *Addlington* v. *Appleton*, 420

4. In an action by the aſſignees of a bankrupt, the notice under 49 G. 3. c. 121. ſ. 10. that the defendant means to diſpute the validity of the commiſſion, is not to be conſidered as part of the defendant's regular evidence

evidence in the cauſe, but may be proved at the beginning of the trial, and immediately puts the plaintiffs upon ſtrict proof of the trading, petitioning creditor's debt, and act of bankruptcy. *Decharme* v. *Lane*, 324

5. Notice of trial may be given in K. B. for the adjournment day in London, and it is ſufficient to give ſuch notice 8 days in country cauſes and 4 days in town cauſes, before the firſt ſittings after term, *R. G. E.* 1811. xii.

6. Rule for *ſpecial jury* in Middleſex and London muſt be ſerved day preceding adjournment day, and cauſe then marked as ſpecial jury in marſhal's book. *R. G. H.* 1804.—xii.

PREMIUMS OF INSURANCE.

See INSURANCE 2.

PRINCIPAL AND AGENT.

See HORSE, 2. LIEN, 2. SET-OFF.

1. Where a broker is authorized by one man to ſell goods, and to buy ſuch goods for another, an entry in his books of a ſale of theſe goods from the one to the other, ſigned by him, is in general a binding contract between the parties. *The bought and ſold note*, which is a copy of this entry, is not ſent to the parties for their approbation, but to inform them of the terms of the contract. *Heyman* v. *Neale*, 337

2. But if goods in the city of London are ſold by a broker, *to be paid by a bill of exchange*, the vendor has a right, within a reaſonable time, if he is not ſatisfied with the ſufficiency of the purchaſer, to annul the contract. The vendor, however, muſt intimate his diſſent as ſoon as he has had an opportunity to inquire into the ſolvency of the purchaſer.—Five days conſidered too long a period for this purpoſe, *Hodgſon* v. *Davies*, 530

3. The authority of the broker may be countermanded at any time before a memorandum of the contract of ſale is written and ſigned by him, purſuant to the Statute of Frauds, although he has previouſly entered into a verbal agreement to ſell the goods. *Farmer* v. *Robinſon*, 339 *n*

4. If an inſurance broker keeps a policy he has effected in his hands, he is bound to uſe reaſonable diligence to procure the underwriters to ſettle and pay any loſs that may happen upon it. *Bousfield* v. *Crefwell*, 545

5. If an inſurance broker living at a diſtance from his principal, upon a loſs happening, gives him credit in account for the money due from the underwriters; he cannot a conſiderable time after make a demand upon him for the amount of the ſums ſubſcribed by ſeveral of the underwriters who have become inſolvent without paying. *Jameſon* v. *Swainſtone*, 546 *n*

6. If goods are ſold by a broker without diſcloſing his principal, the purchaſer is juſtified in paying him in a different manner from that ſtipulated for by the terms of the contract,—*Aliter*, where the principal is diſcloſed at the time of ſale. *Blackburn* v. *Scholes*, 343

7. The circumſtance of perſons ſelling goods being deſcribed in the catalogue of ſale as *ſworn brokers*, is not ſufficient notice to the purchaſer that they are only agents, to prevent him from dealing with them as principals. *Ib.*

8. Although a factor ſell goods as a principal, yet, if before they are all delivered, and before any part of them is paid for, the purchaſer is informed that they belonged to a third perſon; in an action by the latter for the price of them, the purchaſer cannot ſet off a debt due to him from the factor. *Moore* v. *Clementſon*, 22

PROCLAMATIONS.

A Judge at Nisi Prius will not take judicial notice of the king's proclamations. *Van Omeron* v. *Dowick*, 44

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY TAX.

See USE AND OCCUPATION.

PROTEST.

See BILLS OF EXCHANGE. 28, 32.

PUBLICAN.

An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers. *Holcombe* v. *Hewson*, 391

2. In an action on this agreement, the quality of the beer cannot be proved by shewing what sort of a commodity the brewer furnished to other publicans during the same period. *Ib.*

RECEIPT.

See PARTNERS, 4. STAMP.

RE-EXCHANGE.

1. Bills of exchange upon Lisbon were indorsed by *A.* to *B.* in this country, and afterwards by *B.* to *C.* a merchant at Lisbon. When the bills became due, Lisbon was in the hands of the French, and they were dishonoured. *C.* re-drew upon *B.* in London, but *B.* did not honour the re-drafts. It did not appear clearly whether at that time there was an established course of exchange between Lisbon and London. In an action by *B.* against *A.* upon the bills, the plaintiff's claim to re-exchange was disallowed by the jury, and the court afterwards refused to set aside the verdict upon that ground. *De Tastet*, v. *Baring*, 65

2. The acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal sum, together with interest according to the legal rate of interest where the bill is payable. *Woolsey* v. *Crawford*, 445

REGISTER.

See SHIP, 6, 7, 8.

REPRESENTATION.

See DECEITFUL REPRESENTATION. INSURANCE, 20, 21.

SALE.

See CARRIER. PRINCIPAL AND AGENT.

1. If there be a contract for the sale of goods by a particular ship *on arrival*, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods. *Boyd* v. *Siffkin*, 326
Hawes v. *Humble*, 327 *n*

2. *A.* sold to *B.* all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by *C.* the agent of the concern. – *C* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons. Held, that the contract must be confined to such hemp as *C.* should ship as agent to *A.*, and that *A.* was not answer-

answerable to *B.* for more than the 71 tons. *Hayward* v. *Scougall*, 56

3. The owner of goods sends them to a wharf in the Borough of *Southwark*, where goods of the same sort are usually sold: The wharfinger, without any authority, sells them to a *bona fide* purchaser, who duly pays for them —This is not a sale in *market overt* to change the property, and trover lies for the goods at the suit of the owner against the purchaser. *Wilkinson* v. *King*, 335

4. Goods sold remain at the risk of the seller while any thing is to be done to them by him to ascertain the amount of the price. Therefore where 289 bales of skins (stated in the contract to contain 5 dozen in each bale) were sold at 57s. 6d. a dozen: and it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any enumeration took place, the whole were consumed by fire;—held, that an action could not be maintained against the purchaser for the value of the skins, and that the loss fell entirely upon the seller. *Zagury* v. *Furnell*, 240

5. A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is *remeasured*, and that before the malt in question was remeasured, the seller became bankrupt. *Stonard* v. *Dunkin*, 344

6. If it is stated generally in a bought and sold note that the goods are to be paid "*by bill*," evidence cannot be received to shew, that *by bill* is meant *an approved bill*: and *semble*, that an *approved bill* is a bill to which there is no reasonable objection, and that ought to be approved. 532

SEAMEN'S WAGES.

1. In an action for seaman's wages the plaintiff may under 2 G. 2. c. 30. give evidence of the contents of the ship's articles, without having served a notice to produce them. *Bowman* v. *Manzelman*, 315

2. A seaman at monthly wages, who is impressed or enters from a merchant ship into the royal navy during a voyage, is not entitled to wages to the time of his quitting the ship, unless the voyage be completed. *Anon.* 320 *n*

3. In the course of a voyage some of the seamen desert, and the captain not being able to find others to supply their place, promises to divide the wages which would have become due to them among the remainder of the crew. This promise is void for want of consideration. *Stilk* v. *Myrick*, 317

4. Where it is provided by a ship's articles that any of the crew who shall absent themselves from the ship without leave shall forfeit their wages, if, after one of the crew has so absented himself, the master receives him back again and allows him to work like the others, the forfeiture is waived, and the wages are recoverable. *Miller* v. *Brant*, 599

SET OFF. 8.

See PRINCIPAL and AGENT, 8.

In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by the plaintiff to the defendant, which the latter effected with a *del credere* commission. *Wienholt* v. *Roberts*, 585

SHERIFF, 4. 5.
See ACTION, 10. EVIDENCE, 4, 5. PLEADING 3.

SHIP.

See EVIDENCE. FREIGHT. LIEN, 3.

1. If by reaſon of the crowded ſtate of the *London Docks*, a ſhip is detained there before ſhe can be unloaded, a longer time than is allowed for that purpoſe by the terms of the charter-party, the freighter is liable for this detention to the owner of the ſhip *Randall* v. *Lynch*, 352
2. If by a charter-party leave is given to detain the ſhip a certain number of days for the purpoſe of diſcharging her cargo, this amounts to a covenant on the part of the freighter, that he will not detain her longer. *Randall* v. *Lynch*, 356
3. If the freighter of a ſhip employed to bring a cargo of wine into the port of *London*, covenant to unload her *in the uſual and cuſtomary time* at her port of diſcharge, he is not liable for the detention of the ſhip in the London Docks, if ſhe is there unloaded in her turn into the bonded warehouſes. *Rodgers* v. *Forreſters*, 483
4. If by the bill of lading of a cargo of brandy brought into the London Docks, no time is ſtipulated within which it ſhall be unloaded, the implied contract on the part of the conſignee, is to diſcharge the ſhip in the uſual and cuſtomary time for unloading ſuch a cargo—which is the time within which the brandies can be unloaded in the Docks into the bonded warehouſes. Therefore, the conſignee is not, under theſe circumſtances, liable to make compenſation to the owner of the ſhip, in the nature of a demurrage, for any delay occaſioned by the crowded ſtate of the London Docks, although the cargo might have been landed ſooner, if the duties had been immediately paid. *Burmeſter* v. *Hodgſon*, 488
5. If a ſhip is chartered for a particular voyage, and put up as a general ſhip by the charterer, it is not enough to make the owners liable for the non-delivery of goods to ſhew that they were put on board the ſhip to be carried in this voyage, unleſs it be proved that they were received on board by ſome perſon appointed or authorized by the owners. *Mackenzie* v. *Rowe*, 482
6. The defendant purchaſed a ſhip taken in execution under a fi. fa. in the year 1805; but the legal title was not regularly transferred to him till 1810. In 1806 he entered into an agreement with the captain to let him the ſhip for three years at a certain yearly rent, and in no way interfered with the management of the ſhip afterwards. Held, that the defendant was not liable for ſtores ſupplied to the ſhip during the three years, by order of an agent of the captain. *Frazer* v. *Marſh*, 517
7. To prove that *A.* is liable as a regiſtered owner of a ſhip, entries in the cuſtom houſe books of the port of London and of the out port to which the ſhip belongs, ſtating that ſhe was transferred to *A.* by *B.*, the original owner, are not ſufficient evidence. *Frazer* v. *Hopkins*, 171
8. In an action againſt ſeveral defendants for ſtores ſupplied to a ſhip by order of the captain, the regiſter obtained on the oath of one of the defendants is *primâ facie* evidence of ownerſhip againſt all. *Stokes* v. *Carne*, 339.
9. The owners of a poſt office packet are liable for ſtores ordered by the captain who is appointed by the poſtmaſter-general, *Ib.*
10. The captain of a ſhip has no authority

authority as such to agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters of the ship in England, and on which he has sailed to a foreign county. *Burgon* v. *Sharpe*, 529

11 Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven for the benefit of the shippers; and if he does so, though acting *bonâ fide* for the interest of all concerned, this is a tortious conversion for which the shipowner is liable. *Von Omeron* v. *Dowick*, 42

12. If a ship is detained beyond the days of demmurrage allowed by the charter-party, the stipulated demurrage is *primâ facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to shew that this would be more or less than a fair compensation for the detention. *Moorsom* v. *Bell*, 616

SLANDER.

See LIBEL. WORDS.

SPECIAL JURY.

See PRACTICE, 6.

STAGE COACH.

1. In an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt; to prove negligence, it is *primâ facie* enough to give evidence of the coach having broke down;—from which negligence will be inferred. *Christie* v. *Griggs*, 79

2. The proprietor of a stage coach is not answerable for any damage that may happen to passenger from the coach being overturned by a mere accident. *Ib.*

STAMP.

1. A receipt for the price of a horse containing a warranty of soundness, may be read in evidence to prove the warranty, without an agreement stamp. *Skrine* v. *Elmore*, 407

2. In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties may be read in evidence without a stamp. *Ingram* v. *Lea*, 521

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— c. 126. (Sale of Offices) 234

STOPPING IN TRANSITU.

See SALE, 3, 4, 5.

When the purchaſer of goods has lodged an order to deliver them with the wharfinger in whoſe warehouſe they lie, and the latter has transferred them in his books into the name of the purchaſer, the vendor's right to ſtop them *in tranſitu* is gone, and the wharfinger is bound to hold them as the agent of the purchaſer. *Harman* v. *Anderſon*, 243. *Et per Curiam in Banco.* The ſame effect is produced, by the delivery-note being lodged with the wharfinger, without a transfer in his books. *Ib.*

SURGEON.

Semble, that notwithſtanding 3 H. 8. c. 11. which enacts, that no one ſhall practiſe as a ſurgeon in London, or 7 miles round, without being licenſed by the college of ſurgeons, under the penalty of 5l. a month; a perſon who is not ſo licenſed may maintain an action for buſineſs done as a ſurgeon within theſe limits, the ſtatute containing no prohibitory clauſe: And at any rate, it is incumbent upon the defendant in ſuch action, to give evidence that the plaintiff is *not* regularly licenſed as the ſtatute directs. *Gremare* v. *Le Clerc Bois Valon*, 144

THEATRE.

Although the audience in a public theatre have a right to expreſs the feelings excited at the moment by the performance, and in this manner to applaud or to hiſs any piece which is repreſented, or any performer who exhibits himſelf on the ſtage; yet if a number of perſons having come to the theatre with a predetermined purpoſe of interrupting the performance, for this purpoſe make a great noiſe and diſturbance, ſo as to render the actors entirely inaudible, though without offering perſonal violence to any individual or doing any injury to the houſe, they are, in point of law, guilty of *a riot*. *Cliſford* v. *Brandon*, 358

TIME.

A patent dated 10th May, contained a proviſo that a ſpecification ſhould be inrolled within one calendar month next and immediately after the date thereof. The ſpecification was inrolled on the 10th of June following. —*Held* that the month did not begin to run till the day after the date of the patent, and that the ſpecification was in time. *Watſon* v. *Pears*, 294

TOLL.

A waggon returning from London loaded with dung, is not liable to be weighed

weighed and charged for overweight under 13 G. 3. c. 84. or 14 G. 3. c. 82. by carrying home two empty bottles and an empty baſket, in which the produce of huſbandry had been brought from the country the ſame day. *Chambers* v. *Eaves*, 393

TREES.

1. A covenant in leaſe to deliver up at the end of the term all the trees ſtanding in an orchard at the time of the demiſe, "*reaſonable uſe and wear* "*only excepted*," is not broken by removing trees decayed and paſt bearing, from a part of the orchard which was too crowded. *Doe d. Jones et ux.* v. *Crouch*, 449

2. Tenant for years cannot maintain treſpaſs *de bonis aſportatis* for timber cut down on the demiſed premiſes. *Evans* v. *Evans*, 491

TRESPASS.

See TREES, 2.

1. If the owner of a chattel gratuitouſly permit another perſon to uſe it, the owner may maintain *treſpaſs* for an injury done to it, while it is ſo uſed. *Lotan* v. *Croſs*, 464

2. If an injury is received from the immediate, though unintentional, act of another, the remedy is treſpaſs, and not caſe; and the Court of K. B. will not permit this doctrine to be queſtioned on a motion for a new trial. 465

3. Treſpaſs will not lie for an irregular diſtreſs, where the irregularity complained of is not in itſelf an act of treſpaſs, but conſiſts merely in the omiſſion of ſome of the forms required in conducting the diſtreſs,—ſuch as procuring goods to be appraiſed before they are ſold. The true conſtruction of the proviſion in 11 G. 2. c. 19. § 19. that the party may recover a compenſation for the ſpecial damage he ſuſtains by an irregular diſtreſs "*in an action of treſ-*"*paſs or on the caſe*," is, that he muſt bring *treſpaſs*, if the irregularity be in the nature of an act of treſpaſs, and *caſe*, if it be in itſelf the ſubject matter of an action on the caſe *Meſſing* v. *Kemble*, 115

4. A ſhop-keeper may maintain treſpaſs for taking goods ſent to him *on ſale or return*. *Colwill* v. *Reeves*. 575

5. To treſpaſs for unmooring the plaintiff's barge, the defendant having pleaded merely the *general iſſue*, cannot give in evidence that he removed it from a ſituation of danger by the plaintiff's authority; or that being frozen to the barge of a third perſon which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of ſafety. *Milman* v. *Dolwell*, 378

6. In treſpaſs for running with a cart againſt plaintiff's chaiſe, the defendant cannot give in evidence under *not guilty*, that the cart and the chaiſe were travelling on the high road in oppoſite directions, and that the colliſion between them happened from the negligence of the plaintiff, or from inevitable accident. *Knapp* v. *Salſbury*, 500

7. If A. for a fraudulent purpoſe mixes his goods with B.'s, ſtill if they can be diſtinguiſhed, he retains the property in them, and he may maintain treſpaſs againſt a perſon who, having a right to take B.'s goods, ignorantly takes theſe goods of A. as part of B's. *Colwill* v. *Reeves*, 576

TRIAL, NOTICE OF.

See PRACTICE, 5.

TROVER.

See BILLS OF EXCHANGE, 23. LIEN, 2. PLEADING, 4.

TWO-PENNY POST.

See BILLS OF EXCHANGE 14, 29.

VARIANCE.

See BAIL BOND. BILLS OF EXCHANGE, PERJURY. PLEADING.

1. In an action for a malicious profecution, an allegation in the declaration, that the perſon profecuted was acquitted by a jury *in the court of our lord the king, before the king himſelf, at Weſtminſter, before the Chief Juſtice*, is not ſupported by a record, from which it appears that the trial took plaee before the Chief Juſtice at *Niſi Prius*. *Woodford* v. *Aſhley*, 9.
2. A bill of exchange expreſſed on the face of it to be "*for value delivered*," is ſtated in pleading to be "for value received." This is not a material variance. *Jones* v. *Mars*, 306
3. If a declaration ſtates that on ſuch a day the defendant drew a bill of exchange, without alleging that it bore date on that date, the day in the declaration is immaterial, though not under a videlicet. *Coxon* v. *Lyon*, 307 *n*
4. But where the declaration alleged that the defendant on, &c. made his certain bill of exchange in writing, *bearing date the ſame day and year aforeſaid*, and the real date of the bill was different, the variance was held to be fatal, 308 *n*
5. In an action by the indorſee againſt the acceptor of a bill of exchange, the declaration ſtated, that the payee indorſed it, *his own proper hand being thereunto ſubſcribed*. It appeared that the payee's name upon the back of the bill, was written under his authority, by his wife. *Semble*, that this is no variance; and at any rate the defendant is not at liberty to object that the indorſement is not in the handwriting of the payee himſelf, after a promiſe, with a knowledge of this circumſtance, to pay the bill. *Helmſley* v. *Loader*, 450
6. In an action againſt the drawer of a bill of exchange, the declaration ſtated, that the defendants made the bill "their own proper *hands* being thereunto ſubſcribed." In fact, their firm of "A. & Co" was ſubſcribed to the bill.—The judge refuſed to nonſuit for the variance. *Jones* v. *Mars*, 305
7. To ſupport an allegation, that to an information in Chancery againſt *T. Eamy*, "the anſwer of the ſaid *T. Eamy* was filed," it is enough to put in an office copy of an anſwer to the information, entitled, "the anſwer of *T. Eamy*," although this be ſigned *T. Amey*. *Salter* v. *Turner*, 87

VENUE.

See PARISH.

1. In an action for ſuſpending a lamp before plaintiff's houſe, to denote that he kept a brothel, the pariſh in which the declaration ſtates the houſe to have ſtood and the tort to have been committed, is to be conſidered as venue merely, not as local deſcription; and it is immaterial whether there be any ſuch pariſh in exiſtence. *Jefferies* v. *Duncomb*, 3
2. If a man writes a letter with intent to provoke a challenge, ſeals it up, and puts it into the poſt-office in Weſtminſter, addreſſed to a perſon in the city of London, who receives it there, the writer may be indicted for this offence in the county of Middleſex. *Rex* v. *Williams*, 506
3. In an action on 1 & 2 P. & M. for driving a diſtreſs out of the hundred, if

if the hundred in which the cattle were diſtrained be in one county and the hundred into which they were driven be in another, the venue muſt be laid in the latter county. *Pope q. t.* v. *Davies*, 266. Overruled by the Court of C. P. 2 *Taunt.* 252.

USE AND OCCUPATION.

1. In an action for uſe and occupation, where the defendant has come in under the plaintiff, he cannot ſhew that the plaintiff's title has expired, unleſs he ſolemnly renounced the plaintiff's title at the time, and commenced a freſh holding under another perſon. *Balls* v. *Weſtwood*, 11
2. In an action for uſe and occupation, where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time he has had the legal eſtate in him, although he may have had the equitable eſtate long before. *Cobb* v. *Carpenter*, 13 *n*
3. In an action for uſe and occupation, the property tax will not be deducted at Niſi Prius from the rent due. *Pocock* v. *Euſtace*, 181

USURY.

1. *Semble*, that lending money *on continuation* is uſurious. *Smedley* v. *Roberts*, 607
2. A bill of exchange is void in the hands of a bonâ fide indorſee, if it was drawn in conſequence of an uſurious agreement for diſcounting it, although the drawer, to whoſe order it was payable, was not privy to this agreement. *Ackland* v. *Pearce*, 599
3. In an action on a bill of exchange, if it appear that the plaintiff diſcounted it for the defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff to prove, that the goods were of the value at which they were eſtimated, for the purpoſe of rebutting the preſumption that the tranſaction was uſurious. *Davis* v. *Hardacre*, 574
4. In an action by the indorſee of a bill of exchange, although it appears that the plaintiff, in diſcounting it, required the indorſer to take part in goods; ſtill, if the latter voluntarily acceded to that propoſal as advantageous to him, the plaintiff is not bound to prove that the goods were of the eſtimated value, and the burthen of proof lies upon the defendant if he would impeach the tranſaction as uſurious. *Coombe* v. *Miles*, 553
5. Where a factor advances money to purchaſe goods, if he receives, beſides legal intereſt, a higher commiſſion on theſe purchaſes than he would have been contented to take had he not advanced the money, the tranſaction is uſurious. *Harris* v. *Boſton*, 348
6. In an action for uſury, the forbearance was laid to have been from the 21ſt of April. On that day, the borrower received from the defendant, as part of the ſum lent, a cheque which was void for want of a ſtamp. This the borrower the ſame day paid into his bankers, who immediately gave him credit for the amount, but who did not themſelves receive payment of it till the following day.—Held, that as to this ſum there was no forbearance till the 22d, and that there was thus a fatal variance between the declaration and the evidence. *Borrodaile q. t.* v. *Middleton*, 53.
7. If one acting as a broker, get bills diſcounted by another perſon at legal intereſt, the tranſaction is not uſurious, however large a commiſſion he may himſelf receive. Therefore, where the acceptors of a bill of exchange tainted by uſury applied to the

the drawer to diſcount other bills for them, to enable them to take it up, and he agreed to get them diſcounted by another perſon on receiving for himſelf 10s. per cent. beyond the legal intereſt, and bills were accordingly accepted by them, which he got diſcounted purſuant to the terms of the agreement,—it was held that theſe bills were valid in the hands of a bonâ fide indorſee, although the perſon who got them diſcounted was liable to a penalty for taking exceſſive commiſſion. *Dagnall* v. *Wylie*, 33

WAGER.

1. An action cannot be maintained on a wager on a point of law in which the parties have no intereſt. *Henkin* v. *Gerſs*, 408
2. An action lies on a wager on a horſe race, if neither of the ſums betted by the parties amounts to 10l. and the race itſelf is run for the ſum of 50l. or upwards. *M'Alleſter* v. *Haden*, 438

WARRANTY.

See HORSE, 2, 3. INSURANCE, 7. 25, 26, 27. 30.

WILL.

See EVIDENCE, 7, 8.

WITNESS.

See ATTESTING WITNESS. PRACTICE, 1.

1. A creditor of a bankrupt who has not proved his debt under the commiſſion, is a competent witneſs to ſupport the commiſſion, although not to increaſe the eſtate. *Williams* v. *Stevens*, 301
2. In an action for the value of goods furniſhed on the defendant's credit to a third perſon, that perſon is not a competent witneſs for the plaintiff, without a releaſe. *Wright* v. *Wardle*, 200
Q. If this perſon be a married woman living apart from her huſband, whether *he* muſt be releaſed to render *her* a competent witneſs? *Ib.*
3. In an action by the indorſee againſt the drawer of a bill of exchange, a prior indorſer is a competent witneſs to prove that the defendant promiſed to pay the bill after it had become due. *Stevens* v. *Lynch*. 332
4. In an action of treſpaſs, a co-treſpaſſer not ſued is a competent witneſs for the plaintiff; but if one of ſeveral defendants allows judgment to go by default, he is not a competent witneſs for the plaintiff, although he is for his co-defendants. *Chapman* v. *Graves*, 333 *n*
5. In an action by the aſſignees of a bankrupt, the petitioning creditor is not a competent witneſs to ſupport the commiſſion, although he may be called on the other ſide to prove it invalid. *Green* v. *Jones*, 411
6. If a witneſs unexpectedly give evidence againſt the party calling him; although his evidence cannot be in part relied upon and the reſt of it diſproved, it may be entirely repudiated, and witneſſes may be called on the ſame ſide to contradict him. *Alexander* v. *Gibſon*, 556
7. A witneſs for the purpoſe of refreſhing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined, from time to time, ſoon after they were written, and while the facts ſtated in them were freſh in his recollection. *Burrough* v. *Martin*, 112
8. In a regular examination upon the *voire dire*, before the examination in chief, a witneſs may be interrogated as to the contents of written inſtruments not produced; but this cannot be done after the examination in chief, although

although the only object of the queſtions then put be to ſhew, that the witneſs is intereſted. *Howell* v. *Lock*, 14

9. Any queſtion may be put to a witneſs in croſs-examination, the anſwer to which may have a tendency to diſcredit him; but if ſuch a queſtion be collateral to the matter in iſſue, the anſwer which the witneſs gives muſt be taken as concluſive, and other witneſſes cannot be called to contradict him. *Harris* v. *Tippett*, 637

WORDS.

See EVIDENCE, 17. INDICTMENT, 1.

END OF THE SECOND VOLUME.

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